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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 315

KARL F. VOEHL, PETITIONER,

vs.

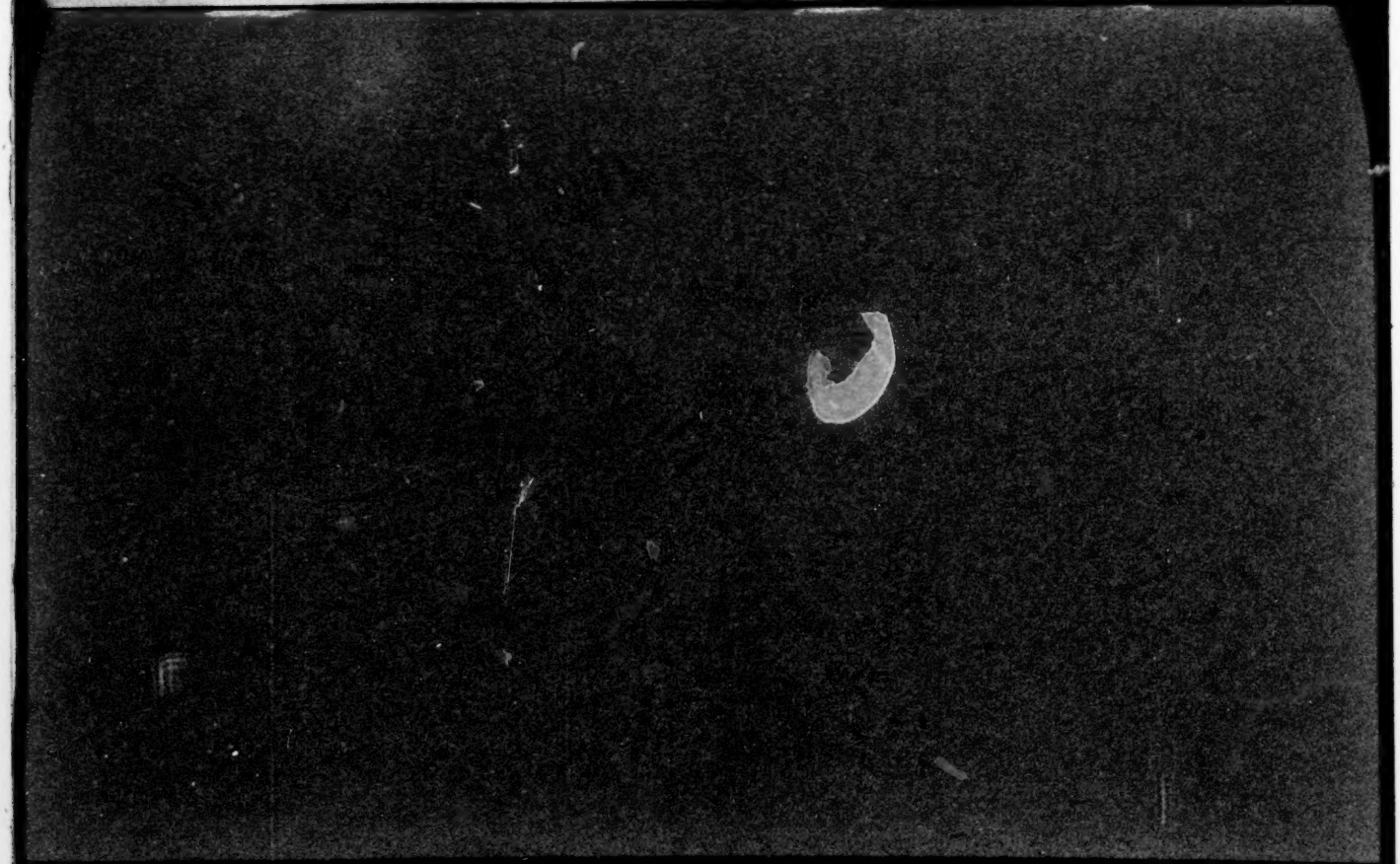
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 24, 1932

CERTIORARI GRANTED NOVEMBER 21, 1932

(37,012)



(37,012)

SUPREME COURT OF THE UNITED STATES

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INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

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[fol. 2]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING EQUITY COURT

In Equity. No. 52413

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, Plaintiff,

vs.

ROBERT J. HOAGE, Deputy Commissioner for District of Columbia of the United States Employees' Compensation Commission, Defendant.

BILL FOR INJUNCTION—Filed February 5, 1931

The Bill of Complaint of the plaintiff, Indemnity Insurance Company of North America, respectfully represents unto the Court as follows:

1. Said plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania, is engaged in business in the District of Columbia and brings this suit in its own right.

2. The defendant, Robert J. Hoage, is a citizen of the United States, a resident of the District of Columbia and is sued as Deputy Commissioner for the District of Columbia, of the United States Employees' Compensation Commission.

3. On April 6th, 1930, and for several years prior thereto, Karl F. Voehl, a resident of the State of Maryland, was employed by the National Electrical Supply Company, a corporation organized and existing under the laws of the State of Virginia and having its principal place of business at 1328 New York Avenue, Northwest, in the City of Washington, District of Columbia, said Company being hereinafter described as the "employer."

4. Pursuant to the provisions of an Act of Congress approved March 4, 1927, (44 Stats. L. 1424) known as the "longshoremen's and Harbor Workers' Compensation

Act," which was made applicable to certain employments in the District of Columbia by an Act aproved May 17, [fol. 3] 1928, (45 Stats. L. 600), plaintiff had issued to said employer and there was in force on April 6, 1930, a policy of insurance, No. WC-196070 insuring payment of compensation in case of injury to or death of said employer's employees arising out of and in the course of their employment.

5. On Sunday, April 6th, 1930, while said Voehl was driving an automobile, owned by him, from his home, Seat Pleasant, Maryland, towards the City of Washington, in a westerly direction along Central Avenue near the intersection of 52nd Street, Northeast, in the District of Columbia, said automobile, as a result of the steering gear becoming out of order or defective, was upset and said Voehl was seriously injured thereby.

6. Due notice of said injury was given by said Voehl to his said employer, to the plaintiff and to the defendant, and, after an investigation of the facts by the plaintiff and by the defendant, the defendant notified the plaintiff's agent, in a letter dated July 2, 1930, that from the evidence presented to his office up to that date, it appeared that Voehl was injured while traveling in his own automobile from his home to his employer's place of business; that he was not shown to have been on a special errand for his employer at the time of his injury, nor was it shown that he had arrived at his place of employment, nor that the employer provided the means of transportation for him to and from his work; that the hazard to which Voehl was subjected at the time of his injury was a traffic hazard and not one incidental to his occupation and "if these facts are correctly stated, it would not seem that the injury arose out of or occurred in the course of employment." A true copy of said letter dated July 2, 1930, is hereto attached marked "Plaintiff's Exhibit 1" and prayed to be read as a part hereof.

7. Thereafter on or about October 7, 1930, said Voehl filed with the defendant a formal claim for compensation, a copy of said claim appearing on page 62 of the transcript hereto attached marked "Plaintiff's Exhibit 2."

8. Thereafter the plaintiff duly notified the defendant that the question of its liability under said Compensation

Act was controverted and the defendant ordered a hearing thereon.

[fol. 4] 9. At such hearing held before the defendant on December 11th, 1930, it was admitted by plaintiff that said employer was subject to the provisions of said Compensation Act at the date of the injury on April 6, 1930; that the relatiionship of employer and employee existed at that time between said Supply Company and Voehl; that due notice was given of the injury; that Voehl's wages amounted to about $45 per week so that, in case of temporary total disability, if he was entitled to any compensation at all, he would be entitled to the maximum compensation of $25 per week under Section 6 and to medical treatment under Section 7 of said Act, but plaintiff denied that said injury arose out of or in the course of said Voehl's employment and denied that Voehl was entitled to any compensation whatever.

10. At said hearing, besides the testimony of a physician concerning the injuries, only two witnesses testified on behalf of said Voehl, namely, Hugh L. Finnigan and C. Leslie McCrea. Their testimony is fully set forth in the complete transcript of said hearing, which is hereto attached marked "Plaintiff's Exhibit 2" and prayed to be read as part hereof. Omitting details, said witnesses testified substantially as follows:

Hugh L. Finnigan, Voehl's brother-in-law, living at Carmody Hills, about half a mile from Voehl's home on A Street, in Seat Pleasant, Maryland, testified that early in the morning on Sunday, April 6, 1930, Voehl came to Finnigan's home and asked Fninigan to go with him to his employer's warehouse in Washington to help him get a load of ashes, which they planned to dump on A Street in the mud in front of the house, Voehl saying that he needed help to lift the big cans of ashes, but he did not need any help in cleaning up the warehouse; they then went back to Voehl's home, had breakfast there, then started to the warehouse located at 1328 New York Avenue N. W., in Washington, Voehl driving his own car, and after crossing the District Line, the accident occurred at 52nd Street and Central Avenue N. E.; that after the accident, while on the first aid table, Voehle was worrying about the ashes, "that was the only thing that bothered him," and Finni-

gan, with the help of another brother-in-law, borrowed a truck and, at Voehl's request, removed the ashes from the [fol. 5] Supply Company's plant and dumped them on Carmody Road; they did not plan to go on any personal errands going to or coming from the warehouse; they expected to drive to the warehouse, pick up the Company's truck and move the ashes; Voehl also said something about cleaning up the plant; Finnigan made no charge for his services; he had accompanied Voehl to the warehouse on only one occasion previously and then, after working hours, he helped Voehl load and haul a truck load of lumber and trash to Voehl's home where the lumber was used for kindling wood and the trash was destroyed; on other occasions, Voehl had brought ashes and trash out to his home and Finnegan had helped him to dump them.

C. Leslie McCrea, manager of the refrigeration division of the Supply Company, testified that Voehl was employed under him as "Head of products division," and, in that capacity, supervised unloading refrigerators, placing them in the warehouse, unpacking, delivery and installation in customers' homes; he was charged with seeing that buildings were kept in proper order and fire rules complied with; his regular hours were from 7:30 a. m. to 5:30 p. m. on week days; the Company, at its expense, put a telephone in his house and when customers called after store hours, Voehl would take care of the call personally or instruct one of the service men to do so, as they maintained 24 hour service on their refrigerators; Voehl was trusted with a key to the warehouse for that purpose; as manager of the warehouse and service, Voehl had charge of overtime for all employees and on Monday morning each week, he submitted a memorandum of his own overtime as well as that of other employees; employees, who owned automobiles, when on service calls, were allowed overtime pay and mileage at five cents a mile from the time they left their homes until their return; Voehl's overtime was never questioned when he worked extra hours; McCrea did not know the condition of the warehouse with respect to cleanliness on the day of the accident, or the day before, but knows it was their busy season and the unpacking of many refrigerators is always attended by an accumulation of trash which must be cleared up; Voehl and other employees were permitted to take boards and trash for their own use,

as it saved the Company the cost of hauling it away; Voehl had about twelve men employed under him at the ware-[fol. 6] house and two service men; the removal of the ashes was not a part of Voehl's duty and was not even incidental to the operation of the refrigeration department; the taking away of the lumber was not a duty assigned to Voehl; Voehl was not paid for his mileage from his home to and from work during the week; "one of the troubles I had with Voehl was that he always insisted on doing too damned much work himself;" he would tear a crate to pieces and pile up the lumber instead of making others do it; McCrea did not know of any Sunday on which Voehl worked previous to the accident; the Company did not furnish transportation to any employees going to and from work on week days, but if they came to work on Sundays for any particular purpose, they were allowed mileage from the time they left their homes; when the men quit their day's work and took ashes home, they were not paid extra time because they had ashes with them, as it was a convenience for the employees solely.

At the hearing, McCrea was requested to furnish a record of payments made to Voehl for overtime and mileage during the six months preceding April 6, 1930, and replied by letter, dated December 19, 1930 (pages 67-69 of Exhibit 2), that the records for 1929 had been destroyed; that Voehl had a petty cash fund, out of which he paid himself for mileage and overtime and then turned in a memorandum thereof, but it was difficult to give an accurate statement of dates and amounts; that "based on a study of our entire operation for the first three months of 1930", he found an instance on Sunday, February 2, 1930, when Voehl came to the warehouse without specific instructions, but for the purpose of (1) removing an exhibit from Washington Auditorium at the conclusion of the automobile show, (2) to generally arrange and straighten up the warehouse, and (3) to take an inventory of stock on hand; "on February 3, 1930, we honored his request for mileage covering this trip in the amount of 20 miles at 5¢ per mile, or $1.00, and under date of February 6, 1930, we paid him the sum of $11.00 to replenish his petty cash fund. Part of the memorandum given us to cover this disbursement of $11.00 shows a payment of $2.25 in connection with the removal of the automobile show exhibit."

Voehl did not testify at the hearing, but in lieu thereof filed a statement (pages 63-66), which corroborated and [fol. 7] repeated some of the statements above summarized and in addition thereto stated that he had to come down quite often on Sunday to clean up; that his mileage and time were computed from his home until he returned home, was not confined to ordered calls to customers' homes, but whenever he felt it necessary to make a special trip to the building, as on the day of the accident, he was paid for mileage and overtime; that he did not have to receive special authority from his foreman, but exercised his own discretion as to the necessity for the trip; that he had general orders not to let trash accumulate in the building and did his utmost to see that it was free of all trash, when inspection was made every Monday morning; he was unusually busy and handled about 20 or 30 refrigerators per day about the time of the accident; this caused trash to accumulate faster, making it necessary for him to come down to the building the Sunday of the accident; he would dispose of the trash, ashes and timber either on the dump, at the homes of employees or at his own home, as it made no difference to his employer as long as he rid the building of it.

11. Said witnesses, with the exception of Voehl, were cross-examined by counsel for plaintiff and the substance of their testimony on such cross-examination is set forth in the foregoing paragraph. No other testimony was offered by the plaintiff at said hearing.

12. Thereafter briefs were filed with the defendant on behalf of plaintiff and on behalf of Voehl, and under date of January 8, 1931, the defendant made and filed a compensation order, containing findings of fact and an award, a true copy of which is hereto attached marked "Plaintiff's Exhibit No. 3". Said findings contain a conclusion of law that Voehl's injury arose out of and occurred in the course of his employment and said award directs said Supply Company and the plaintiff to pay Voehl forthwith compensation for temporary total disability, beginning April 6, 1930, to January 3, 1931, a period of 39 weeks, at $25.00 per week, amounting to $975.00, and to continue to pay compensation beginning January 4, 1931, at $25.00 per week, payable every two weeks, until further order of de-

fendant; to pay Voehl's attorney, Israel J. Mendelson, $50 for legal services and to provide medical and hospital treatment in accordance with Section 7 of said Compensation Act as the nature of the injury and process of recovery may require.

[fol. 8] 13. Plaintiff avers and charges that Voehl's said injury did not arise out of or in the course of his employment; that Voehl's said claim does not come within the provisions of said Compensation Act; that said compensation order, findings of fact and award are "not in accordance with law," and are not supported by, but are directly contrary to the evidence presented to the defendant at said hearing.

Wherefore, in consideration of the premises, plaintiff prays:

1. That a writ of subpœna be issued by this Court against said defendant, Robert J. Hoage, Deputy Commissioner, requiring him, by a day certain to be therein named, to appear herein and answer the exigencies of this Bill of Complaint;

2. That an injunction issue, pendent lite and permanently, restraining the enforcement of said compensation order and award and requiring the defendant to vacate and set the same aside;

3. That the payment of said award be stayed, pending final decision herein;

4. That the plaintiff may have such other and further relief as the nature of the case may require and to the Court may seem proper.

Indemnity Insurance Company of North America, by E. W. Miller, Its Vice-President. McKenney, Flannery & Craighill, by G. B. Craighill, Tebbs & Myers, Attorneys for Plaintiff.

Duly sworn to by E. W. Miller. Jurat omitted in printing.

[fol. 9] PLAINTIFF'S EXHIBIT NO. 1 TO BILL OF COMPLAINT

52413

United States Employees' Compensation Commission, District of Columbia Workmen's Compensation Act, Room 400 Investment Building, Washington, D. C.

Commissioners: Bessie P. Brueggeman, Chairman; Harry Bassett, John M. Morin. Robert J. Hoage, Deputy Commissioner.

In reply refer to File No. —.

July 2, 1930.

Ralph W. Lee & Company, 1508 L Street N. W., Washington, D. C.

GENTLEMEN: Regarding the case of Karl F. Voehl vs. the National Electric- Supply Company, it is noted that you have submitted certain facts to this office for consideration with respect to the compensability of the case.

From the evidence presented to this office to date it appears that the facts in the case are as follows:

(1) Mr. Voehl was injured in an automobile accident on or about Sunday, April 6, 1930, while travelling from his home to his employer's place of business, the National Electrical Supply Company at 1330 New York Avenue N. W., Washington, D. C.

(2) It is presumed that Mr. Voehl reported to this place daily, furnishing his own car as means of transportation to and from his work.

(3) The employer paid Mr. Voehl mileage for the use of his car when he went on special errands, but he was not shown to have been on a special errand for the employer [fol. 10] at the time of his injury, nor was it shown that he had arrived at his place of employment.

(4) It has not been shown that the employer provided the means of transportation for the claimant to and from his work.

(5) The hazard to which the claimant was subjected at the time he was injured was a traffic hazard and not one incidental to his occupation.

If these facts are correctly stated, it would not seem that the injury arose out of or occurred in the course of employ-

ment. If, however, there are other facts which would alter the status of the case they should be submitted for further consideration by this office.

Very truly yours, R. J. Hoage, Deputy Commissioner.
RJH/l.

PLAINTIFF'S EXHIBIT NO. 2 TO BILL OF COMPLAINT

United States Employees' Compensation Commission for the District of Columbia

Before Hon. R. J. Hoage, Deputy Commissioner for the District of Columbia

No. 322-33

KARL F. VOEHL, Claimant,

vs.

NATIONAL ELECTRIC- SUPPLY CO., Employer; Indemnity Insurance Company of North America, Insurance Carrier

Transcript of Testimony at Hearing

Pursuant to notice, this matter was heard before Honorable R. J. Hoage, Deputy Commissioner, United States Employees' Compensation Commission, at Washington, D. C., on the 11th day of December, 1930, at —.

Appearances: Israel J. Mendelson, Esq., Attorney for Claimant; Frank H. Myers, Esq., Attorney for Respondent.

[fol. 11] COLLOQUY

The Deputy Commissioner: This is the case of Karl F. Voehl, claimant, against the National Electric- Supply Company, the employer, and the Indemnity Insurance Company of North America, the insurance carrier.

Having been formally set for hearing the case is presented for consideration at this time.

The parties present are — Is the claimant present?

Mr. Mendelson: No; the claimant is incapacitated.

The Deputy Commissioner: Then you are representing the claimant, Mr. Mendelson?

Mr. Mendelson: Yes.

The Deputy Commissioner: And what witnesses have you?

Mr. Mendelson: I have Mr. Hugh L. Finnigan and Mr. C. Leslie McCree and Dr. R. Apgar.

The Deputy Commissioner: Representing the respondent is Mr. Frank H. Myers?

Mr. Myers: Yes.

The Deputy Commissioner: What witnesses have you, Mr. Myers?

Mr. Myers: We have no witnesses.

The Deputy Commissioner: Mr. Myers, you are representing the respondent, the insurance carrier?

Mr. Myers: Yes.

The Deputy Commissioner: Do you admit that the employer, Mr. Myers, was subject to the provisions of the District of Columbia Workmen's Compensation Act at the date of the alleged injury?

Mr. Myers: Yes.

The Deputy Commissioner: And do you admit, Mr. Myers, that the relationship of employer and employee existed at the date of the alleged injury?

Mr. Myers: The relationship; that is, no duties were being performed for the employer.

The Deputy Commissioner: I mean the relationship of employer and employee existed on that date?

Mr. Myers: Yes.

The Deputy Commissioner: How about the notice of injury, Mr. Myers?

Mr. Myers: I admit due notice of injury.

The Deputy Commissioner: You admit that due notice of injury was given to the employer and to the Deputy Commissioner?

[fol. 12] Mr. Myers: Yes.

The Deputy Commissioner: Well, now, how about the wages? Can we agree, so that we won't have that question, on that?

I believe it will be necessary because of statements contained in the file of the Deputy Commissioner that the actual earnings of the employee for one year preceding the date of the injury — furnished the Deputy Commissioner by the employer and I so order.

Will you admit that statement if it is under the signature of the employer, Mr. Myers?

Mr. Myers: Yes.

The Deputy Commisioner: Will that be agreeable to you, Mr. Mendelson?

Mr. Mendelson: Yes.

Mr. McCree (representative of the employer): You can put in a statement that they were approximately $2500.

The Deputy Commissioner: I will have to have it in a definite record signed by you, under oath, before a notary public, and introduce that as part of the proceedings, and we agree that it will be considered part of the proceedings.

Mr. McCree: All right.

The Deputy Commissioner: Can we agree, for the purpose of this hearing, gentlemen, that it was approximately -2500?

Mr. Myers: I will agree that it is a maximum case. Both the employee and the employer claim that.

The Deputy Commissioner: Then we can agree that it is a maximum case?

Mr. Mendelson: Yes.

Mr. Myers: Yes.

The Deputy Commissioner: Now, Mr. Mendelson, will you make a statement of what your claim is in this case, for the purposes of the record?

Mr. Mendelson: Mr. Karl F. Voehl was employed by the National Electric Supply Company——

The Deputy Commissioner (interposing): That is admitted.

Mr. Mendelson: And, on Sunday, April 6th, around 8 o'clock, he left his home in company with Mr. Finnigan, his brother-in-law, to go to the plant, that is the building of the National Electric Supply Company, to clean up the place.

[fol. 13] The Deputy Commissioner: Your claim is he left, in the performance of his duty, to go to this particular place?

Mr. Mendelson: Yes.

The Deputy Commissioner: That will be sufficient.

Mr. Mendelson: And, on the way to the plant, in that capacity, he was met with an accident in which he was injured.

The Deputy Commissioner: And you are claiming compensation for temporary total disability from the date of the injury to the present time and still continuing?

Mr. Mendelson: Yes, and still continuing.

The Deputy Commissioner: And you are making claim for medical treatment, and so forth, in accordance with section 7 of the Act?

Mr. Mendelson: Yes.

The Deputy Commissioner: Now, Mr. Myers, what is your denial?

Mr. Myers: We deny that the injury arose during the course of employment and while performing duties for the employer.

The Deputy Commissioner: Then, you deny that it arose out of or in the course of the employment as provided in the Act?

Mr. Myers: Yes.

The Deputy Commissioner: I think at this time that I had better make part of this record Form D. C. C. A-303, entitled: "Employee's Claim for Compensation" filed in the office of the Deputy Commissioner on October 30th, 1930, in accordance with the District of Columbia Workmen's Compensation Act, in which it is indicated that Karl F. Voehl, the employee, was in the employ of the National Electric Supply Company and was injured on the 6th day of April at about 8:30 o'clock a. m. Is that correct, Mr. Myers?

Mr. Myers: That is what the form says.

(The document in question was thereupon marked: "Claimant's Exhibit No. 1" and, as such, is filed in the office of the Deputy Commissioner with the original papers in this case.)

The Deputy Commissioner: All right, Mr. Mendelson, you may proceed to set up your case.

[fol. 14] First, I will swear the witnesses, Mr. Finnigan, and Mr. McCree.

Mr. Mendelson: All right.

(Thereupon Hugh L. Finnigan and C. Leslie McCree were duly sworn by the Deputy Commissioner.)

The Deputy Commissioner: You may proceed, Mr. Mendelson.

Mr. Mendelson: All right, I will call Mr. Finnigan.

Mr. Myers: Suppose we exclude Mr. McCree while the other witness is testifying.

The Deputy Commissioner: You may, but he is the employer here.

Mr. Myers: But, he is not our witness, however.

(At this point Mr. McCree retired from the hearing room.)

Thereupon HUGH L. FINNIGAN was called as a witness for and on behalf of the claimant and, having been previously duly sworn, as above indicated, was examined and testified as follows:

Direct examination.

By Mr. Mendelson:

Q. Mr. Finnigan, you knew Mr. Voehl?
A. Yes, sir.

The Deputy Commissioner: What is your full name?
The Witness: Hugh Larkin Finnigan.

By the Deputy Commissioner:

Q. And your address?
A. 6603 Carmody Road, Carmody Hills, Maryland.

The Deputy Commissioner: All right.

By Mr. Mendelson:

Q. You know Mr. Voehl?
A. I certainly do.
Q. Is he related to you?
A. He is my brother-in-law.
Q. Did you have occasion to be with Mr. Voehl on or about April 6th, 1930?
A. As to the exact date I cannot swear, but I was with him if you are referring to the time of the accident, yes.
[fol. 15] Q. Yes. Now, will you state the occasion and if anything unusual happened on that date?

The Deputy Commissioner: I think we can admit there was an accident and he suffered an injury. Cannot we admit that, Mr. Myers?
Mr. Myers: I imagine we can.
The Deputy Commissioner: An injury on the trip.

Mr. Myers: Yes.

The Deputy Commissioner: So we won't have to waste time on that.

Mr. Myers: No.

By Mr. Mendelson:

Q. Well, what reasons did he give you for your accompanying him that day?

A. Well, he came over to the house that Sunday morning and told me he would like me to go with him to the warehouse, that he hated to bother me so early in the morning but he had to move the ashes there and needed help for that but he could clean up the warehouse, he said, and he said he did not need any help for that. That is the reason he asked me to accompany him.

Q. Did you ever have occasion to go with him previous to this time?

A. No, I did not go to the warehouse cleaning up with him except one evening I went with him after working hours; we went there and we took a truck load of trash away.

Q. What did you do after the accident?

A. After the accident I got in touch with my other brother-in-law who lives in Silver Spring.

By the Deputy Commissioner:

Q. What is his name?

A. Andrew Archer and, together, we went in and borrowed a truck from Mr. Monroe who does quite a little hauling for the National Electric Company and him and I removed the ashes because my brother-in-law said that they had to be removed and while he was on the first aid table he was worrying about the ashes and said they had to be gotten away from there. That was the only thing that bothered him.

By Mr. Mendelson:

Q. Was it at his request that you went to the plant?

A. Yes.

[fol. 16] Q. And you did remove ashes that day?

A. Yes.

Q. What else did you do around there?

A. That was all. We did not go to the warehouse. We had no authority to go there.

Q. What did you do with the ashes?

A. The ashes were dumped on Carmody Road.

Q. Where is that with reference to the home of Mr. Voehl?

A. With reference to the home of Mr. Voehl, that would be about five blocks away from Carmody Road—I would say a half a mile it would be to Mr. Voehl's residence. We took the truck out from there after we loaded it with ashes, we took the truck out and we tried to salvage his machine and could not do it, and then we dumped the ashes.

Q. What is the nature of the dumping place, a public one?

A. Yes, a public road, a county road.

Q. Had you planned to go to any other place on the day of the accident?

A. After he was through with his work, yes. After he was through with what he said he had to do we had planned, as we always had done, traveling down the country.

Q. Did you plan to go on any errands on your way back home?

A. No.

Q. By "errands" I mean personal errands. Is that what you refer to?

A. No errands of any kind, either going into there or coming back to the house again.

Mr. Mendelson: That is all.

Cross-examination.

By Mr. Myers:

Q. Mr. Finnigan, have you ever gone to move the ashes there before this time?

A. No, the only time I went there and Mr. Voehl was using the company truck and would bring the ashes out to his place and loads of trash and then I would help him dump them.

Q. When was that?

A. That happened often, practically off and on as every winter he had been working there.

Q. Was the company truck used on each one of those occasions?

A. Yes.

Q. How did you expect to move the ashes this time?

A. Mr. Voehl was to use the company's truck.

[fol. 17] Q. You drove in with Mr. Voehl's car and you were to pick up the——

A. (Interposing.) We were to pick up the truck at the warehouse. Well, Mr. Voehl was to do that.

Q. Where was that truck?

A. In the warehouse.

Q. He was to pick up the truck at the warehouse and move the ashes?

A. Yes, sir.

Q. Was it your intention to do anything else besides move the ashes that day?

A. He had said something about cleaning up the plant for Monday morning.

Q. What was your intention to do in reference to cleaning up the plant? Were you to help him clean up the plant?

A. No, he said—I gladly would have helped him—but he said that he would not bother me except for the ashes; the other work he would have done himself but he could not lift the big galvanized cans of ashes.

Q. Who lifted the ashes on previous occasions?

A. He had his son help him, his oldest son, his oldest boy.

Q. You had only once been before to the warehouse to assist Mr. Voehl?

A. Yes.

Q. When was that?

A. Oh that has been, that has been over a year ago.

Q. What was the occasion of that?

A. That was up there loading lumber and boxes of trash on the truck.

Q. Where did you take those?

A. That was taken out to his house.

Q. Was Mr. Voehl given those things as part of his duties?

A. Why, all that lumber and stuff there, from what I have seen personally, why, goes to all the employees there.

The Deputy Commissioner: I think the question and answer both ought to be stricken. He does not know the duties at the plant.

Mr. Myers: The question was not as to his duties, but what he did with the things.

The Deputy Commissioner: Read the question and the answer.

The Reporter (reading): "Q. Was Mr. Voehl given those things as part of his duties?

"A. Why, all that lumber and stuff there, from what I [fol. 18] have seen personally, why, goes to all the employees there."

The Witness: That is something I cannot answer.

By Mr. Myers:

Q. What did Mr. Voehl do with the kindling wood when you went there a year ago and helped him move it?

A. That was used, that was used, any that was any good was used and the rest of it was burned.

Q. Was it taken to his home?

A. To the lots adjoining his place.

Q. And the kindling wood was taken to his own home?

A. Yes.

Q. And he used it for himself?

A. Yes, sir.

Q. You did not live with him?

A. No.

Q. You are not employed by the National Electric-Supply Company?

A. I never have been; rather, I have had occasion, the other evening, to be employed by them a few hours.

Q. Who are you employed by regularly at this time?

A. Right at the present time I am one of the army of the unemployed but I am still on the payroll, subject to call, from Thomas Culler, painter and decorator, at 726 Colorado Building, the Hamilton Decorating Company.

Q. Will you be good enough to set up the route you took as you went to the warehouse on the date of the accident?

A. Certainly. We took the road—Mr. Voehl came to my house with me on Carmody Road.

Q. Where does Mr. Voehl live?

A. He lives at 2nd and A Street, Seat Pleasant, Maryland.

Q. All right, now. What was the first route you took?

A. The first road that we went on, if you want the whole route?

Q. Yes?

A. We went on A Street to Chapel Road——

Q. (Interposing.) I understand he picked you up first?

A. He picked me up first, at my house.

Q. Where is your house?

A. On Carmody Road.

Q. What is the address?

A. 6603.

Q. Is that northeast or northwest?

A. That is Seat Pleasant, outside of Seat Pleasant, Carmody Hills.

Q. How far from Mr. Voehl's house is that?

A. That is about half a mile.

[fol. 19] Q. In which direction, toward the city or away?

A. Toward the city.

Q. East or west?

A. Now, you have me. I do not know the directions out there.

Q. All right. When he picked you up, where did you go next?

A. We went past, we went back past Mr. Voehl's house.

Q. You went back past his house?

A. Yes.

Q. Then where did you go?

A. From there we went out A Street to Chapel Road.

Q. Then where?

A. And we turned right into Central Avenue.

Q. All right. Where next?

A. We continued through Capitol Heights.

Q. All right?

A. And across the District line, and the accident happened at 52nd Street and Central Avenue.

Q. What time did you leave your house?

A. I left my house about 8 o'clock.

Q. 8 a. m. in the morning?

A. Yes.

Q. And when you went back to the Voehl house, did you stop there? How long did you stop there at Mr. Voehl's house?

A. We stopped there somewhere around about fifteen minutes or a half an hour. We had breakfast there.

Q. So you left Mr. Voehl's house at about what time?

A. We left there at approximately 8:30.

Q. What time did the accident happen?

A. The accident happened—it could not have happened in about fifteen minutes from that time.

Q. About 8:45?

A. Around 8:45, yes.

Q. You stated in your direct examination that after you were through this particular work at the warehouse you planned to go somewhere else?

A. Yes, we planned to go somewhere else, to Mr. Voehl's house and from there we were going down——

Mr. Mendelson (interposing): That is immaterial.

The Witness: We were going, on that trip, that trip that we make every weekend, and, in fact, I still make it.

[fol. 20] By Mr. Myers:

Q. You have only had one other occasion, and that was about a year ago, on which occasion you went with Mr. Voehl to help him?

A. Yes, to my knowledge; it might have been other times, but I do not remember.

Mr. Myers: I think that is all I have to ask this witness.

By the Deputy Commissioner:

Q. Who paid you for your services this day, anybody?

A. Why that day I worked with Mr. Voehl there was no service, no charge at all; it was just voluntary.

Q. On the previous occasion did you get paid for your services?

A. No. There was only once that I was ever paid by the National Electric Company and that was just a few nights ago.

By Mr. Mendelson:

Q. You did this purely for Mr. Voehl?

A. Yes, to help him out.

Q. The route you had taken to go to the National Electric Supply Company, was that the shortest route to the plant?

Mr. Myers: I think the facts speak for themselves on that, Mr. Mendelson.

By the Deputy Commissioner:

Q. Is that the route he travelled every day?

A. That is the route that he travelled every day and it is the route that I travel; but, there is a shorter route. We do not travel it because it is more winding.

By Mr. Mendelson:

Q. Now, you spoke before of the disposition of the lumber and trash. Did you ever see him dispose of the trash, that is, outside of the ashes?

A. You mean destroy them?

Q. Yes?

A. He destroyed right at his place.

Q. Was there any use made of the lumber?

A. Just kindling wood, that's all.

Q. Was it all used for kindling wood?

A. No, lots of it could not be used for kindling wood and it was destroyed, those free ply boxes were all destroyed.

[fol. 21] Q. It was brought out there and then destroyed?

A. Yes.

Mr. Mendelson: That is all.

(The witness thereupon was excused and retired from the witness stand.)

Thereupon C. Leslie McCree was called as a witness for and on behalf of the claimant and, having been previously duly sworn as above indicated, was examined and testified as follows:

Direct examination.

By the Deputy Commissioner:

Q. State your full name, please, for the record?

A. C. Leslie McCree.

Q. And your address?

A. 3300 Cathedral Avenue, Northwest.

By Mr. Mendelson:

Q. What is your employment?

A. I am manager of the refrigeration division of the National Electric- Supply Company.

Q. As manager of the refrigeration division, what are your duties?

A. Complete charge of the sale, delivery, installation, collecting and seeing that refrigerators are paid for.

Q. You have charge of all the men working in that department?

A. I do.

Q. And charge of their payroll?

A. I do. That is, I have general charge of it. I fix the payroll; it is handled through the accounting department.

By the Deputy Commissioner:

Q. Do you have supervision of the work of Mr. Voehl?

A. Yes.

Mr. Mendelson: I am coming to that.

The Deputy Commissioner: All right.

By Mr. Mendelson:

Q. Mr. Voehl was employed in your division?

A. He was.

[fol. 22] Q. What is the length of his employment there?

A. He has been—the refrigeration division of the National Electric- Supply Company is about four years old. Mr. Voehl previously was employed in other divisions of the company for a total period of around sixteen years; about that.

Q. In what capacity was Mr. Voehl employed in your division?

A. Mr. Voehl had charge, first of all, of the maintenance and operation of the warehouse and, second, he was charged with seeing that service on refrigerators in operation in customers' homes, etc., was maintained. We called it: "Head of the products division".

Mr. Myers: I did not hear that.

The Witness: I said we call it: "Head of the products division."

By Mr. Myers:

Q. Head of the product- division?

A. We divide the business into sales, products and accounting.

By Mr. Mendelson:

Q. You mentioned the maintenance and operation of the warehouse. What were his duties under that heading?

A. Mr. Voehl supervised the unloading of the refrigeration units, refrigerators, placing them in the warehouse, unpacking, examination before delivery, delivery, and installation in customers' homes.

Q. What would his duties, if any, be with reference to the maintenance of the plant itself, the buildings, rather?

A. Mr. Voehl was charged with seeing that the buildings were kept in proper order and that the stock was kept in proper order and that the fire rules were all complied with, and things of that nature, general duties, that fall in a position of that kind.

Q. What was his salary?

Mr. Myers: I do not believe we need to go into that.

The Deputy Commissioner: I would like to have that gone into, Mr. Myers, please.

Mr. Myers: All right.

The Deputy Commissioner: For other purposes.

[fol. 23] By Mr. Mendelson:

Q. Before I ask you that question, what were his hours?

A. Mr. Voehl's regular hours were from 7:30 in the morning until 5:30 in the evening, with an hour off for lunch. In addition to his regular hours he was on duty all of the time, on our call. That is to say, he was a very willing employee and we kept him purposely for taking care of emergencies and seeing that all details were cleaned up properly. To that end we put a telephone in his house and had a system of relaying calls to him; when customers would call in after our regular store hours; that is, our watchman would take a call and transfer the call to Mr. Voehl and then Mr. Voehl would either take care of the call personally or he would call some other service man under his direction and tell him to go and take care of the thing and in that way we maintained a 24-hour a day service on our refrigerators which is perfectly natural because if a man breaks down, that is if his refrigerators break down on Saturday night or Sunday he does not want to wait until Monday for service or maintenance.

Mr. Voehl was trusted with a key to the warehouse for that purpose. In other words my recollection is there was only one other man beside himself who had access to the warehouse at any time in the 24-hour period.

Q. Who paid for the telephone, Mr. McCree?

A. We paid for the telephone.

Q. What was your method of paying Mr. Voehl for these calls and his work outside of the regular hours?

A. Mr. Voehl in his capacity as manager of the warehouse and service had charge of the overtime for all employees and, on Monday morning each week, he would submit to us a memorandum stating that such and such employees were entitled to so many hours' overtime during the preceding week and, included in that, would be himself.

Now, we calculate, or rather I personally feel that if we get a man out, or he goes out on an evening, we pull him out of bed, as we sometimes do, or something like that as we do frequently, we certainly ought to pay him and we do pay him from the time he leaves the house until he gets back, and they make up their time accordingly on that basis.

In addition to that, we have a combination system of furnishing transportation. That is, those employees who [fol. 24] own their own automobiles we try to assist them in paying for them and, naturally, assist ourselves to pay flat mileage a flat mileage charge for the use of their automobiles for whatever job they go on. If we send them out in the day from our warehouse on a job why, with their own car, we pay them five cents a mile from the time they leave the warehouse until the time they return and, similarly, if they are called out from their home at night, we pay them whatever the mileage is from their homes to the place they go to and from there to their home back.

Now, in the case, for example, where we were to go out to the customer's house and find a unit that was stuck—that is, inoperative,—what we would do would be to pay the mileage from the employee's home to the house, from the house down to the warehouse, from the warehouse back to the house and back to the customer's home; in other words, complete mileage for the trip.

Q. What was his pay for the time that he spent on such work?

A. It was calculated out at approximately the same rate per hour we paid during the week.

Q. Approximately how much?

A. Well, we never pinch pennies. I hesitate to say that. It would be a guess and my guess would be, if any, that he would probably collect somewhere around 75 cents to a dollar an hour for the time outside of his job; 75 cents probably would be about right per hour.

Q. You refer to these calls as being taken care of outside of his regular working hours? Was he to do any other work outside of his regular working hours for which he could put in extra time?

A. Well, Voehl was one of the most conscientious employees I have ever known. Naturally, he could not be with us sixteen years without having been so and we gave him the job and expected him to do it. If there was anything that needed to be done we could absolutely rely that he would do it and, as far as specific or detailed instructions go, it is my own policy not to give men specific instructions but to let the men do the job and I look for the results more than what we exactly tell them to do.

Q. In other words, did he have control of maintenance in the plant as he saw fit?

A. Yes. There were certain rules that he had to live up to and if they were not lived up to and I happened to [fol. 25] go over in the morning—my policy is to drop in the warehouse when least expected—and if it is not in order why, then, we talk to them about it.

Q. Was it permissible for them to put in more hours, that is hours outside of their regular employment?

A. I never questioned Voehl's overtime one bit. I have checked it enough to know that he was honest in his statements and if he put in an overtime charge for five hours or six hours or three hours that week, I am certain it was correct.

Q. But, was it permissible?

A. Yes.

Q. That was beyond the regular hours?

A. Yes, that is right.

Q. He would have the privilege of working outside the regular hours?

A. Yes.

Q. That is Mr. Voehl?

A. Yes. Well, that same thing applies too, would apply, to one or two other men we have down there. Mr. Voehl was not entirely alone in that statement.

Q. Speaking of Mr. Voehl on that particular Sunday: would you say that Mr. Voehl had the power to go to that plant under his duties?

A. Yes.

The Deputy Commissioner: You mean authority or power?

Mr. Mendelson: Authority.

The Witness: He had.

By Mr. Mendelson:

Q. Could he hand in a slip for the work that he had done on that Sunday and make a charge?

A. He could.

Q. Could he have made a charge for the mileage?

A. He could.

Q. You would have recognized it?

A. I would.

Q. Do you know of the condition of the cleanliness of the building on or about that date? A. I do not on the day of the accident, no, I did not know of the condition, but my subsequent investigation indicated the condition; in other words, I was generally familiar with the specific condition three or four days previously and while I did not actually see the warehouse on Saturday afternoon, I have what other people with me, other employees, told me.

[fol. 26] Mr. Myers: I object to that.

The Witness: If that is permissible I will tell it if it is not I won't.

The Deputy Commissioner: No, only what you know.

By Mr. Mendelson:

Q. Do you know what the condition of the plant was?

A. I know this much: I know that our busy season starts in March, our normal month's business for example——

The Deputy Commissioner (interposing): The question was about the condition of the building that day. Do you know what that condition was?

The Witness: I do not.

By Mr. Mendelson:

Q. Or a short time prior to that?

Mr. Myers: We are not interested in "a short time prior to that". We are interested in what the condition was that day.

Mr. Mendelson: If Your Honor please, it would be material. There would be a——

The Deputy Commissioner (interposing): If necessity arose on this day for any particular thing to be done——

Mr. Mendelson (interposing): That would be only an accumulation of things that arose a week prior to that day.

The Deputy Commissioner: If he knows what the condition was or if it was in a cumulative process.

The Witness: I know that the business for the first week in April was approximately three times what it had been for the weeks preceding, immediately preceding that; in the three days prior to the date of the accident we had unpacked a total of some sixty refrigerators. Now, that exact figure is subject to correction, that is merely approximate. Now, sixty refrigerators and sixty machine- produce one hundred and twenty crates and the refrigerator is packed in a large heavy board crate, or were at that time; I know from previous experience that the unpacking of that amount of material and the delivering of that amount of material is always attended by a large accumulation of trash and litter which must be cleared up.

[fol. 27] By Mr. Myers:

Q. But you don't know that it was not cleared up before the day of the accident?

A. I do not.

Mr. Myers: Then I object to the answer again.

The Witness: I do know that two or three days prior to the accident I had called his attention to the necessity of keeping it better cleared up.

By Mr. Myers:

Q. But you don't know that it was not cleared up before the day of the accident?

A. What?

Q. I am asking you: You don't know that it was not "better cleared up" as you say, the day before the accident or the day of the accident?

A. No, I do not.

The Deputy Commissioner: I think it is a matter of little importance because if the man was going there as he customarily had, that condition is not very material.

Mr. Myers: I want to again note objection to the answer to that question as being not responsive; it is merely a conclusion reached because he thought it was a busy season.

The Deputy Commissioner: It will be accepted for what it is worth, Mr. Myers.

By Mr. Mendelson:

Q. What were Mr. Voehl's orders with reference to the disposition of trash and rubbish of the plant?

A. Mr. Voehl's orders with reference to the disposition of trash and rubbish w*as*-: he was under strict orders to pile all waste packing material and the lumber in neat piles; the loose trash in boxes and to remove them immediately after their accumulation; to keep the warehouse halls clear, the aisles cleared, and to see that nothing accumulated that would cause a fire; also to keep the aisles and the windows open as required by the fire regulations.

Q. What were his orders as to the disposition of these things? Where were they to be disposed of?

A. The disposition of our trash is a matter that ordinarily costs us money. He was directed to take what he wanted for his own use, as are any of our other employees. The customary practice has been for employees when returning home from their duties to take such boards, or [fol. 28] sawed pieces of packing material—they are usually two feet long by two by four, already cut, which makes a very good fire wood, and it was their privilege to take this material home in their automobiles if they wished to and it still is. Any surplus that is not immediately removed is carried in our own truck to the dump or to some place of disposal. Naturally, if we can get employees to take it on their return home, why, it saves us money and saves us hauling and we are willing for them to do it because that costs them, that costs us nothing. They merely take it home with them.

Q. Then it was immaterial with you where the trash was disposed of or the ashes, as long as they were not in the building?

A. My specific instructions have always been to the warehouse—and they still are—I do not care how the men get rid of it even if it is necessary to hire trucks to do it.

Q. That was only incidental to the building?

A. That is right.

Q. I will ask you again, to make sure that it is on the record, what you have paid Mr. Voehl?

The Deputy Commissioner: You asked him that and he answered it.

Mr. Mendelson: All right. You may cross-examine, Mr. Myers.

Cross-examination.

By Mr. Myers:

Q. Mr. McCree, how many men did Mr. Voehl have under him?

A. At that time, of course?

Q. Oh, yes?

A. My guess would be about twelve at that time. Wait a minute, about—put two more on there, service men; there were twelve warehouse men and two on service. I would qualify that by reference to the records.

Q. And the duties of Mr. Voehl were that of a supervisor or manager of the maintenance and operation of the warehouse, in other words, special service to refrigerators in the home?

A. No.

Q. Will you repeat again the exact duties that Mr. Voehl had?

A. The title that should be applied to him is "Head of the product division". As such, he had charge of the [fol. 29] operation of the warehouse as far as the refrigerators are concerned, from the unloading to the delivery, the delivery into the customer's home and the specific service thereafter.

Q. Did you have any special man for removing ashes?

A. The ashes were—Now, I am giving you my understanding of this.

By the Deputy Commissioner:

Q. Just answer his question first.

A. No; the ashes are not a part of our particular department; the removal is incidental.

By Mr. Myers:

Q. What do you mean by "the removal is incidental"?

A. I mean the same practice has been followed with reference to ash removal as in our own case with reference to lumber removal; it is generally the practice among employees that where they need ashes for any particular purpose, and some of them do, they may take them; I know, for example, some employees who use the ashes for driveways and so forth. They have taken ashes as well as lumber.

Q. It is a matter of personal desire, then, on the part of the employees when they take the ashes?

A. Yes.

Q. And it is not a duty or was not a duty of Mr. Voehl or of any of the other employees to remove the ashes?

A. It is not the duty of the employees to remove them. It is the duty of the employees to place them in a position to be removed.

Q. So far as Mr. Voehl's duties were concerned the question of removing ashes in the company truck or in any other truck is not a part of his duties unless he wants the ashes for his own home?

A. I do not quite see what you are getting at and I don't know that I am making myself clear; we do not care what happens to the material after it is cleared up, but we are very, very much interested in keeping that material cleared up. How it is finally disposed of I don't care.

Q. My question, as far as the removal of the ashes is concerned, is that it was not an assigned duty of Mr. Voehl except where he wanted the ashes for his own use, for use in or about his own home?

[fol. 30] A. The actual taking away of the ashes from the building was not an assigned duty of Mr. Voehl's. The actual taking away of the lumber from the building was not an assigned duty to Mr. Voehl.

Q. Now, as a matter of fact, the removal of the ashes themselves was not even incidental to the operation of the refrigeration department, are they?

A. That is perfectly true.

Q. You say that Mr. Voehl's regular hours were from 7:30 in the morning to 5:30 in the evening?

A. That is right.

Q. How many days a week?

A. Seven days a week, if necessary.

Q. I am asking you about his regular hours, not the "hours if necessary". I don't mean "if necessary". I mean regular hours?

A. Five days a week, Saturdays a half day.

Q. Five and a half days a week?

A. Yes. Five and a half days a week, Saturday until 1 o'clock.

Q. Now, you spoke of paying for transportation. That is on the basis of flat mileage for the use of employees' automobiles by the employees. In this particular case Mr. Voehl owned his own machine?

A. That is correct.

Q. Did you pay for his mileage going to and from work during the week?

A. You mean from Monday to Saturday?

Q. Yes?

A. No.

Q. Now, you also said that Mr. Voehl had charge of the overtime of all employees. You mean by that the employees, the employees under him and himself?

A. That is correct.

Q. And you say that that overtime charge——

A. (Interposing.) Will you amplify the question?

Q. You say the record of the overtime was kept by Mr. Voehl?

A. Yes.

Q. How was the record of the overtime kept as far as Mr. Voehl was concerned?

A. As far as he himself was concerned?

Q. Yes?

A. He put in a statement at the end of the week.

Q. Was there any particular form on which he made these returns?

A. No.

[fol. 31] Q. I mean the returns for the overtime?

A. No. He simply handed in a memorandum. Half the time the memorandum was written on a piece of brown

paper, or something similar to that, torn off and it would say: "So much for overtime", so and so on such and such a date.

Q. Was any record kept of the mileage turned in for the use of the automobile, particularly in Mr. Voehl's case?

A. I should say not, off-hand.

Q. Are you familiar with these books at all (handing some books to the witness)?

A. I am.

Q. What are those books?

A. As far as I know, these are regular expense books that were made up in the office by the clerk to keep the cashier's record of the money paid out, based on memoranda sent in by Mr. Voehl.

Q. Would this be an accurate record of the overtime and transportation charges?

A. It would be an accurate record of what we paid.

Q. Actually what you paid?

A. Yes.

Q. And you paid without question whatever was turned in?

A. That is right.

Q. You do not know whether or not the overtime charge included—for instance, you have no knowledge whether it would include a trip from Mr. Voehl's house to his brother-in-law's house and back again and then on to the warehouse, or not?

A. That is perfectly true. We have no time clock on the automobile and we still have none.

Q. As a matter of fact, Mr. Voehl's duties were principally concerned, were they not, to seeing that your 24-hour service to homes was kept up?

A. No, I think not. I have so stated otherwise.

Q. The reason you put Mr. Voehl a telephone in at your expense was to make him available so calls coming in for refrigerating service could be promptly handled on your 24-hour a day service?

A. That is correct.

Q. So his duties principally were concerned with keeping up the prestige of the service to the home?

A. That is an incorrect assumption.

Q. Outside of the fact he also saw to the uncrating and storage of the refrigerators in the warehouse which duties are only incidental to the others?

A. Without this going on the record, sir, I might say [fol. 32] that one of the troubles I had with Voehl was that he always insisted on doing too damned much work himself. He was one of those fellows who pitched in and tore a crate to pieces and piled the lumber up. My principal trouble with Voehl was always instead of making others do the work he would pitch in and do it. It is valuable to have this disposition, but sometimes it is not the right way to organize. That is one of the troubles that I always had with him: he insisted on doing a lot of work himself.

Q. You had to depend absolutely on what Voehl turned in on the question of overtime?

A. I not only—I prefer to have you say that I did depend on him.

Q. Well, you did depend actually on Mr. Voehl for the determination as to the overtime?

A. That is right.

Mr. Myers: That is all I have to ask. Just a moment.

By Mr. Myers:

Q. Do you have any information of your own knowledge that Mr. Voehl had been working Sundays overtime?

A. I did.

Q. Prior to the date of the accident?

A. I did.

Q. Can you recall any Sunday on which he worked?

A. I cannot.

Q. How long ago do you think it was that he worked on Sunday, before the accident which took place on Sunday the 6th of April, according to the testimony here. Do you recall that Sunday and can you tell us what Sunday it was before that Sunday that he worked?

A. I do not know.

Q. Can you recall about how many Sundays there were when he worked?

A. I do not know. I might say there, Mr. Myers, that the one man who could have answered that question specifically for you unfortunately dropped dead last September. That was my assistant.

Mr. Myers: I would like to have permission to have furnished for the benefit of the record for the year prior

thereto, from the examination of the records—Mr. McCree can furnish us with it himself—the overtime charged for Mr. Voehl for any work he did on Sundays.

The Witness: I question whether we can furnish those records.

[fol. 33] By Mr. Myers:

Q. Is this kept as a matter of record?

A. I doubt very much if those are available for the full year.

Q. How about these (indicating some books)?

The Deputy Commissioner: What do you mean by "these"?

Mr. Myers: I want Mr. McCree to identify them.

The Deputy Commissioner: All right.

By Mr. Myers:

Q. I want to, Mr. McCree, have you identify these (handing documents to the witness)?

A. (After examining the documents.) These are the pencil memorandum-. These appear to be——

By the Deputy Commissioner:

Q. (Interposing.) Just describe them for the record.

A. These are pencil memorandums showing various expense items and overtime charges.

By Mr. Mendelson:

Q. Does that show all of the time that he put in outside of his regular hours?

A. There again I am unable to say definitely. He was trusted. We trusted him.

The Deputy Commissioner: Let me see them.

(The documents in question were then handed to and examined by the Deputy Commissioner.)

Mr. Mendelson: I object to their admission in evidence. That is not a complete list.

Mr. Myers: We will ask Mr. McCree to furnish it.

The Witness: I have no way of furnishing it.

By Mr. Myers:

Q. Do you know of your own knowledge that these slips are kept on file in your company for the purpose of keeping a record of the overtime?

A. I do not. To the best of my knowledge and belief these slips simply are put there as a memorandum to justify [fol. 34] cash disbursements. After each periodical audit, it is my understanding they are destroyed. That is subject, however, to further correction.

Q. What is—what record is maintained by your company or is there, is an overtime charge record for a period of a year, a record by which the overtime paid can be shown?

A. I do not think there is any, off-hand. I will check and find out. I get a statement each month for the amount of expense of each department and we check back on it.

Q. But the individual records of the employees fail to show the amount of overtime allowed or paid them during the period in which they are employed by your company? Is that right?

A. I think we can give you a record of the total amount paid, but whether we can tell you that such and such an amount was paid—in fact I know we can give you the record of the total amount paid, but whether I can say that this represents overtime or this represents something else, I would hesitate to say. I do not know and I do not think anyone knows.

Q. But these are your company's records?

A. Yes, but they are so meagre and the dates—well, I would not be able to say.

By the Deputy Commissioner:

Q. Is that the overtime slip for the week ending on the period stated there (handing a slip to the witness)?

A. (After examining the slip.) Yes.

Q. And the actual dates are not on there of what date they refer to?

A. These dates are down here, sir, and knowing the character of men that are over there I would hate to say definitely that this was so, or to say that that was so, or that they were for a certain day in that period. I would not swear that that was a correct statement. I will say, though, that that is a correct statement of the amount of money paid.

By Mr. Myers:

Q. But as to the days for which the money was paid, you have no idea?

A. I would not say that I have no idea, but I cannot say definitely what days they are.

Q. But you would not be able to tell me what days in that week he worked overtime (indicating the slip)?

A. No.

[fol. 35] Mr. Myers: I still want to request that Mr. McCree be asked to furnish from the records of his company the overtime that Mr. Voehl was paid for at least a period of six months prior to the date of the accident, the purpose of which is for the basis of showing that Mr. Voehl did not work on Sundays.

Mr. Mendelson: May it please your Honor, that is immaterial here because the evidence shows that he had the right to work on Sunday. Assuming that he did not work on any other Sunday he did have the right to work on that Sunday or on any Sunday. Mr. McCree testified that he had the right to go there Sunday if he wanted to.

The Deputy Commissioner: I think we are entitled to know that he did work on Sunday.

The Witness: Are you going to give me a written request for that? Will you give me a written request of what you want?

The Deputy Commissioner: You are interested more in Sundays.

Mr. Myers: Yes.

The Deputy Commissioner: Just the Sundays, then, for the six months prior.

The Witness: I doubt if I can give you that.

The Deputy Commissioner: Do the best you can.

Mr. Mendelson: That would not affect his practice, if your Honor please.

Mr. Myers: I think that is all I have to ask.

The Deputy Commissioner: I want to ask Mr. McCree a few questions. Are you through?

Mr. Mendelson: Yes.

By the Deputy Commissioner:

Q. You testified that Mr. Voehl's duties were home service in addition to work at the warehouse?

A. That is right.

Q. And I believe you testified that the telephone was put in his house so that when any special calls came in for home service, outside of hours, they could be reported to him at his home?

A. That is right.

Q. Now, when he made these particular calls were those the ones particularly that he was allowed mileage for in his car?

A. Those were part of the times that he was allowed mileage.

[fol. 36] Q. Part of the times?

A. Yes. Any work that he did outside of office hours that necessitated the use of his car he was paid mileage for.

Q. What was the arrangement?

A. Or, as a matter of fact, within hours.

Q. What was the arrangement in regard to his going out on special calls?

A. That he use his own car.

Q. He used his own car?

A. Yes, he used his own car.

Q. Outside of these calls, was it his particular business to report to the shop?

A. I do not follow your question.

Q. Did you expect him to report to the shop at a certain time in the morning?

A. Oh, yes.

Q. And that was 7 o'clock?

A. No. That was 7:30 o'clock.

Q. 7:30 o'clock in the morning he was required to report at the shop?

A. Yes.

Q. Did you furnish transportation to all your employees to and from the office?

A. No, we did not furnish transportation to any of our employees on week days.

Q. To and from your office?

A. To and from the office, no.

Q. What do you mean by "week days"?

A. In other words, Monday morning to Saturday morning and Monday to Friday evening and on Saturday afternoon returning home or wherever they wished to go—we did not furnish transportation for that.

Q. Did you furnish Mr. Voehl with transportation for that?

A. No.

Q. Did you furnish transportation if they had occasion to come down on Sunday for any particular purpose?

A. Yes, we furnish transportation for that. We allowed that in on their mileage. They understood that — they were called out or if it was necessary for them to do any work on Sunday outside of office that we expected to pay them from the time they left the house until the time they returned.

(The witness thereupon was excused and retired temporarily from the witness stand.)

The Deputy Commissioner: I want to ask Mr. Finnigan another question.

Thereupon HUGH L. FINNIGAN was recalled as a witness and upon examination testified as follows:

[fol. 37] By the Deputy Commissioner:

Q. When you started out on Sunday morning with Mr. Voehl, you started to get the ashes, you stated, and then you were going back home and going on another errand that afternoon. Is that right?

A. Mr. Voehl said he would not have bothered me if it was not for the ashes. What else he had to do he would have done himself.

Q. Did he say that he was going some other place that afternoon and not going to do the other work?

A. No. He went there specifically to straighten up the warehouse and bring the ashes back home when he came back.

Q. Where was he going to put them?

A. He was going to dump them in the road on A Street, in front of the house.

Q. Is that the road you travel on?

A. Yes.

Q. What was your purpose in dumping the ashes on A Street?

A. He was trying to kill the mud in the road. It is a street that the county does not seem to want to do anything to it, and that is the way he took care of it.

Q. Then, to your knowledge, he did not have any agreement with the county to haul the ashes in?

A. No.

Q. He just did that as a matter of his own convenience?

A. As a community effort; they practically built the street there themselves.

The Deputy Commissioner: That is all.

(The witness thereupon was excused and retired from the witness stand.)

Mr. Myers: I would like to ask Mr. McCree another question.

The Deputy Commissioner: All right.

Thereupon C. Leslie McCree was recalled to the witness stand and upon examination testified as follows:

Cross-examination (resumed).

By Mr. Myers:

Q. Can you name anything else that Mr. Voehl used to use his — for other than the service, that is going to see what was wrong with refrigerators that you had installed in people's homes?

A. Oh, yes; he used his car for emergency service on the [fol. 38] lighting plant or taking parts down to the lighting plant.

Q. All of that was in connection with the lighting plant?

A. Yes. His employment prior to the time he was shifted over to the refrigeration department or in connection with that, was in connection with the lighting plant, and he was about the only one left that knew anything very much about them and if a man had his lighting plant down and it was necessary to go to the warehouse and get a part, he would go down there and get it for him and then fix up his lighting system and water.

Q. That is another instance of servicing, servicing the lighting plants?

A. Yes, sir, whatever you might call it.

Mr. Myers: All right.

Redirect examination.

By Mr. Mendelson:

Q. You spoke before about the number of men under Mr. Voehl. Did that depend on Mr. Voehl?
A. You mean the number of men?
Q. Yes, working under Mr. Voehl?
A. You mean did he have charge of hiring and firing?
Q. Yes? A. He did with the advice and the approval of Mr. Stoody.

Mr. Myers: I think he should insert in the record that Mr. Stoody was assistant and the date when he died.

By Mr. Myers:

Q. When did he die?
A. September 8th, 1930, or September 9th.

By Mr. Mendelson:

Q. Mr. McCree, what facilities did you provide for the removal of ashes?
A. We provided no facilities for the removal of ashes ourselves. That was provided by the building division, that is it was outside of the refrigerator division, but it was naturally in the same category as the removal of other trash.
Q. And it was satisfactory with your department to take care of that end of it?
A. Sure; if they wanted to take them away they could [fol. 39] take them away. It did not hurt us any.
Q. And the charge was perfectly permissible to be placed in your department for the time spent on that?
A. I do not think he spent time on the removal of ashes when he was on his way home.

The Deputy Commissioner: Was he on his way home or down to the plant?
Mr. Mendelson: He is speaking in general of all the employees if they took the ashes home.

The Witness: If they wanted to gather up a couple of cans of ashes and put them in the back of the car it saved us something that we did not have to pay out. But, we weren't any more interested in that than anything else they might have taken home.

By Mr. Mendelson:

Q. If it was necessary to remove the ashes, state whether the employees did not do that in order to clean up the plant?

A. I want you to understand that, particularly, the removal of ashes was not under Mr. Voehl's jurisdiction. That is, Mr. Voehl was not charged with the responsibility of removal of ashes. There is another individual charged with that, and that is Mr. Fields. He worked with the company. Mr. Voehl was charged with the removal of lumber, and that is a product of our own department, that is the refrigerating or refrigerator waste.

Q. If he put in any overtime charge for the removal of ashes, would you have honored that?

A. I would not have honored any overtime charge for the removal of ashes solely, but if he was on his way home, after having performed work for us and he took the ashes with him, it was perfectly agreeable to me.

Q. Were the details of these slips that we have been referring to actually known to you?

A. No.

Q. You honored them as they were presented?

A. Yes.

Mr. Mendelson: That is all.

[fol. 40] Recross-examination.

By Mr. Myers:

Q. Then there was nothing in the past then, no basis at all for paying Mr. Voehl for removing those ashes?

A. Well, no.

Q. And there was nothing in the past that would prevent Mr. Voehl from charging you for the removal of the ashes and putting in overtime for them and you would pay it?

A. That is perfectly true. And Mr. Voehl could have sent another employee down to do the same work and you

would not pay that because Mr. Voehl was the only one who had access to the warehouse.

Q. Suppose he gave the key to another man?

A. The watchman would not have let him use the key.

Q. You say the watchman would not have let him use the key?

A. Yes.

Q. An employee of your company?

A. Mr. Voehl was the only man who had access to the warehouse. Mr. Voehl was the only man, and Mr. Ross—they were the only men.

Q. Did not Mr. Ross work under Mr. Voehl?

A. He was directly under him.

Q. And Mr. Ross could have been sent down and done that work?

A. Yes, and he would have collected overtime for it.

By Mr. Mendelson:

Q. Do I understand that Mr. Voehl was in the habit of working in other departments of the National Electric-Company?

A. No. That is an incorrect assumption. I say he used to work in the other departments and, in order to still satisfy the customers if it was necessary for him to go out and do a job he did it. As a matter of fact, a considerable portion of his overtime work in the course of the year would be taking his Sunday and going down in southern Maryland and doing an overtime job for the company in the repair of a light plant.

By Mr. Myers:

Q. Do you know that of your own knowledge?

A. I do.

Mr. Mendelson: That is all.

[fol. 41] By the Deputy Commissioner:

Q. Do you know whether Mr. Voehl had been instructed to go back to the plant on this day, on Sunday, the day of the injury?

A. I know this: I know that the warehouse for the two or three days prior to Sunday was in a badly littered condition.

Mr. Myers: I again object to that same question. He has gone through that matter and he said he did not know anything about the day in question.

The Deputy Commissioner: That is the day. He is stating that now.

By the Deputy Commissioner:

Q. Do you know whether or not he had customarily gone down on Sunday or about how many Sundays he had gone down?

A. I do not. I know that Mr. Voehl did the job and if it was necessary for him to work evenings he worked evenings and if it was necessary for him to work Sundays he worked Sundays and, when a man does his job, I ask nothing further of him. All I ask is results and as long as he does it, that is the end of it.

Q. These other men got through their work and started for home so that their days' work usually ended when they left the plant. Is that true?

A. No, many times if Mr. Voehl——

Q. (Interposing.) I am not talking about Mr. Voehl. I am talking about the other men.

A. If we relayed a call to Mr. Voehl, Mr. Voehl would use his judgment as to how to handle it.

Q. I am talking about the men who worked regularly at the plant.

A. I am speaking about the same thing. For example, we had a service call——

Q. (Interposing.) You are bringing something else into the question. I am asking you about nothing except the other men. When the other men quit their day's work and took ashes home, did you pay for the extra time because they had the ashes with them?

A. Oh, no, no. No.

By Mr. Mendelson:

Q. Was not the removal of the ashes that his Honor is speaking of, was that not merely a matter of convenience [fol. 42] for the employees if they removed them?

A. It was a convenience for the employees solely.

Mr. Mendelson: That is all.

(The witness thereupon was excused and retired from the witness stand.)

Thereupon Dr. R. Apgar was called as a witness for and on behalf of the claimant and, having been previously duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct examination.

By the Deputy Commissioner:

Q. What is your name, please, Doctor?
A. Dr. R. Apgar.

The Deputy Commissioner: Now, I wonder how much we have to go into the medical end of the evidence here to prove that this man was injured and the nature of the injury?
Mr. Myers: I do not know a thing about the injury.

By the Deputy Commissioner:

Q. Dr. Apgar, what is your address, please?
A. 6119 D Street, Northeast.
Q. You are a registered physician in the District of Columbia?
A. In the District of Columbia and Maryland.
Q. Of what school, Doctor, are you a graduate and in what year did you graduate?
A. University College of Medicine, Richmond, Virginia.
Q. The University of Virginia?
A. Yes.

The Deputy Commissioner: Are there any other questions that you want to ask with respect to qualifying the doctor, gentlemen?
If not, you may proceed with your examination.

By Mr. Mendelson:

Q. Did you attend in a professional capacity, Doctor, Mr. Karl F. Voehl, since on or about the 6th of April?
A. Yes, sir.
Q. 1930?
A. Yes, sir.
[fol. 43] Q. What was the occasion?
A. He was in the hospital and I was called to the hospital to see him. He had sustained a fracture of the spine.

By the Deputy Commissioner:

Q. Who called you in, Doctor?
A. I beg your pardon?
Q. Who called you in?
A. The family, Mrs. Voehl.
Q. Go ahead.
A. And the condition to me—Dr. Rodgers and Dr. Lee Custis Hall; he is the one who operated on him—I saw him one day on the 5th, and the next day Dr. Hall thought it prudent to operate on him and he, with the assistance of myself and Dr. Rodgers performed the operation on the spine. He had three or four of these vertebra- kind of mixed up and jammed.
Q. Which ones?
A. In the dorsal region.
Q. Which one?
A. I do not just recall now. It seems to me it was the second, third and fourth, and one of these vertebræ was pushed forward or backward, was pushed backward—no, it was pushed forward, and that is what did the damage to the cord, the spinal cord, producing this paralysis which he sustained and still has, it still remains.
Q. What paralysis is that?
A. Paralysis of the lower extremities; paralysis from the waist down.
Q. Affecting the extremities or the intestinal organs?
A. No, the lower extremities; somewhat too, his bladder and intestines. Anything below this vertebra (indicating) was paralyzed.

By Mr. Mendelson:

Q. How long, Doctor, do you think that that condition will exist?
A. I don't know—it is a question that I cannot answer from my observation. Prior to this when talking to the other physicians and surgeons I would say that is a question. It is kind of doubtful now if he ever will regain his power there or activity of the lower extremities.
Q. Would you consider that a permanent disability?

Mr. Myers: Don't you think we ought to ask the doctor a few questions as to his experience in this matter?

The Deputy Commissioner: Let him answer this question and then you can ask him others if it is necessary.
[fol. 44] The Witness: What was the question?

The Reporter (reading): "Q. Would you consider that a permanent disability?"

A. I would consider it a permanent disability.

By Mr. Mendelson:

Q. Have you had any practice along this line before?
A. Well, I have seen people paralyzed and, gone this long, this duration, they do not generally recover very rapidly.

By the Deputy Commissioner:

Q. The man is still disabled at this time?
A. Yes.

The Deputy Commissioner: That matter can be settled at a later date, Mr. Myers, if it is necessary.
Mr. Myers: All right.
The Witness: He is still disabled and my talk with the other physicians and surgeons, well, they all agree it is a question whether he will regain his power.
The Deputy Commissioner: You are not denying he is disabled at this time?
Mr. Myers: Not if the doctors say so.
The Deputy Commissioner: That question can be settled later.
The Witness: I recently had Dr. J. P. Shearer, Naval surgeon at this time, to look at the man and he came to the same conclusion. He came to see him because he had contracted erysipilis. I called him——

By the Deputy Commissioner:

Q. (Interposing.) How long ago?
A. I called him in; I thought he would die. That was about a month ago. Where he got this from I don't know.

The Deputy Commissioner: I don't think we need go any further at this time.

(Thereupon the instant hearing was concluded.)

I hereby certify that the foregoing is a complete and accurate transcript of my shorthand report of the testimony and statements, etc., presented at the described hearing.

[Name illegible.] Official Reporter.

[fol. 45] CLAIMANT'S EXHIBIT No. 1

Form DCCA-303

H. S. Middlemiss

Leave this space blank. Case No.: 322-33. Insurance Carrier's No.: 27.

District of Columbia Workmen's Compensation Act.

Office of Deputy Commissioner, Washington, D. C.

Employee's Claim for Compensation

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the Longshoremen's Act.)

Injured Person:

1. Name of employee: Karl F. Voehl. Employee's check No.: 140.
2. Address: Street and No.: 2nd & A Sts.; City or town: Seat Pleasant, Md.
3. Sex: Male. Age: 39. Married, single, widowed: Married.
4. Do you speak English? Yes. Nationality: American.
5. State regular occupation: Service Manager.
6. What were you doing when injured? Driving to place of employment.
7. (a) Wages or average earnings per day: $—. (Include overtime, board, rent, and other allowances.) (b) Per week: $45.00. (c) Were you employed elsewhere during week in which you were injured? No. (d) If so, state where and when: ——.

8. Were you paid full wages for day of accident? No.

Employer:

9. Employer: National Electrical Supply Company.
10. Office address: 1328 N. Y. Ave., N. W.
11 Nature of business: Electrical Supply Co. Branch: ——.

[fol. 46] The Injury:

12. Place where injury occurred: 53rd & Central Ave., N. W. (Give place, and name of vessel.)
13. Name of foreman: Mr. Stoody.
14. Date of accident or first illness: The 6th day of April, 1930, at 8:30 o'clock A. M.
15. How did accident happen or how was occupational disease caused? Automobile broke down.

Nature and Extent of Injury:

16. State fully nature of injury or occupational disease: Automobile injured driver (personally).
17. On what date did you stop work because of injury? April 6, 1930.
18. Have you returned to work? (Yes or No.) No. If "yes," on what date? ——.
19. Does injury keep you from work? (Yes or No.) Yes.
20. Have you done any work in period of disability? No.
21. Have you received any wages since injury? Yes. If so, from and to what date? April 6, 1930, until Sept. 1, 1930.
22. Has injury resulted in amputation? No. If so, describe same: ——.
23. Did you request your employer to provide medical attendance? Yes. Has he done so? Yes.
24. Attending physician: Name: Dr. Raymond Apgar. Address: 6113 D St., N. E.
25. Hospital: Name: Casualty. Address: ——.

Notice:

26. Have you given your employer notice of injury? (Yes or No.) Yes. When? Apr. 6, 1930.
27. If such notice was given, to whom? Mr. Stoody.
28. Was it given orally or in writing? Orally.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

(Signed by) Karl F. Voehl, Claimant.

[fol. 47] Mail address: Box 804 Seat Pleasant, Md.
Dated October 7, 1930.

(Pursuant to instructions of the Deputy Commissioner, the following statement of the Claimant herein is included as part of the transcript of testimony in this case.)

STATEMENT OF CLAIMANT, KARL F. VOEHL, DATED OCTOBER 9, 1930

In reading over the statement I gave to the insurance agent on May the 14th, 1930, I found the same to be incomplete and am therefore adding the following in order to more fully explain the same.

My working hours during the winter months were from 7:30 A. M. to 5:30 P. M., while during the summer months my hours were supposed to be from 7:30 A. M. to 5:00 P. M., while 1:00 was the quitting time on Saturdays.

My employment was confined to the refrigeration department and I had charge of the receiving, delivery and warehousing of the refrigerators handled. In other words, upon the receipt of a refrigerator I would have to uncrate and store it away in its proper place and then prepare it again for delivery to a customer when sold.

In addition to the above, I took care of the special service rendered to the purchasers of refrigerators, and was always subject to call from my home to render such service. The company (Nat'l Electrical) installed a telephone in my home for just such service.

In conjunction with my work about the building, I had to keep the place clean, free and clear of all trash, crating, small timber and paper, accumulating chiefly from the handling of the refrigerators. I had eight men to take care

of the work assigned to me. Two white and two colored men were put on the delivery end of the work while the other 2 white and 2 colored men were for miscellaneous work about the plant. If I saw fit to get more help I would go to 5th and L Sts., N. W., where I could pick up more men.

Although I should have gotten off at 1:00 P. M. on Saturdays, I generally got off about five o'clock because I wanted to get everything ready for the beginning of the following week. There would often be quite an accumulation of trash [fol. 48] and crating on Saturday because of a gradual accumulation over the entire week end because of the fire hazards. I very often could not get everything done by remaining over late on Saturdays, and would have to come down on Sundays to finish cleaning up. During any period of excessive business I had to come down quite often on Sunday to clean up. I did not have to get special permission nor be ordered specially, to come down on Sundays.

My salary prior to January the first, 1930, was $40.00 per week but was increased to $42.50 since then, I was paid (5) five cents per mile for the use of my machine on their business and was paid 75¢ per hour for every hour of extra time I put in for them after my regular working hours at the building. My mileage and time was computed from my home until I returned home. Payment of mileage was not confined, nor was extra time confined, to ordered calls to customers' homes, but also on errands that I myself voluntarily went on without their special authority. Whenever I felt it necessary to make a special trip to the building, as on the day of the accident I was paid for the mileage, at 5¢ per mile from my home to the building and back to my home and was paid 75¢ per hour for the time I put in for the company, which was figured from the time I left home until I returned home. I did not have to receive special authority from my foreman, Mr. Stoody, to go to the building. I could exercise my own discretion as to the necessity of the trip. I could have even used the trucks of the company when I desired.

I took care of the building in accordance with the general order I had from Mr. McCrea, the general manager of the refrigeration department, that trash must not be allowed

to accumulate. It was in carrying out this order that I governed my actions. The manager would inspect the warehouse every Monday morning, in order to see that it was free of all trash. I naturally did my utmost to have the building clean for inspection. It was unusually busy at the building at about the time I sustained my accident as we had to handle about 20 to 30 refrigerators per day. This of course caused the trash to accumulate faster, making it necessary for me to come down to the building the Sunday of the accident. The crating of about 20 refrigerators would make a truck load of timber while 3 large boxes of loose trash would fill a truck.

[fol. 49] I would dispose of the trash, ashes and timbers either on the dump, or at the homes of the employees who could use it, or at my own home. It made no difference to my employer where I would dispose of it, as long as I rid the building of it.

(Signed) Karl F. Voehl.

Witness: (Signed) Amos B. Cole.

October 9th, 1930.

I agree that this statement of the employee shall be introduced into evidence in place of his examination orally.

(Signed) Frank H. Myers.

12/17/30.

(Pursuant to instructions of the Deputy Commissioner, the following letter of the National Electrical Supply Company, the Employer herein, is included as part of the transcript of testimony in this case.)

Letterhead of National Electrical Supply Co., Washington, D. C.

December 19, 1930.

United States Compensation Commission, Investment Building, Washington, D. C.

GENTLEMEN: This letter is written in response to your request for a statement of the payments for overtime work and mileage made to Mr. Karl F. Voehl for the six months prior to April 6, 1930, and for a longer period if possible.

On investigation the writer finds that it has been the practice of this Company to destroy miscellaneous records after a period of one year to make room for subsequent records of like character. For this reason we find that the [fol. 50] records for December, 1929, and months prior thereto, have been destroyed.

Mr. Voehl, in his capacity as Product- Manager, maintained a petty cash fund of approximately $15.00, from which he made payments to employees for overtime work. These payments included those to himself for overtime. It was then his custom to replenish the petty cash fund for these payments by submitting a memorandum voucher to the office whenever his fund had been depleted to such an extent as to so warrant. To give you definite and accurate information regarding the dates, amounts, etc., of all the overtime put in by Mr. Voehl is therefore difficult.

Based on a study of our entire operation for the first three months of 1930, and supported by our records and other facts, we are able to give you information of an exactly parallel instance to that of April 6th which occurred on Sunday, February 2, 1930.

On Sunday, February 2, 1930, Mr. Voehl came into the warehouse, entirely without specific instructions, for the purpose of

(1) arranging to remove General Electric Refrigerator exhibit from the Washington Auditorium because of the conclusion of the automobile show;

(2) to generally arrange and straighten up the warehouse;

(3) for the taking of an accurate physical inventory of stock on hand at that date.

On February 3, 1930, we honored his request for mileage covering this trip in the amount of 20 miles at 5¢ per mile, or $1.00, and under date of February 6, 1930, we paid him the sum of $11.00 to replenish his petty cash fund. Part of the memorandum given us to cover this disbursement of $11.00 shows a payment of $2.25 in connection with the removal of the automobile show exhibit.

Mr. Voehl performed this overtime work on Sunday, February 2nd, 1930, without specific authority from his

superiors, in the normal discharge of his duties, and was paid therefor as being a proper charge against this Company.

It is our belief that were the records of our busy season, that is the period from April 1st to August 1st, available [fol. 51] they would show a number of similar instances, all exactly parallel to the one specifically mentioned above.

Very truly yours, National Electrical Supply Company. (Signed) C. L. McCrea, Electric Refrigeration Department. CLM/ACH.

Subscribed and sworn to before me this 19th day of December, 1930. Chas. O. Reed. (Notary Seal.)

PLAINTIFF'S EXHIBIT NO. 3 TO BILL OF COMPLAINT

United States Employees' Compensation Commission, District of Columbia Compensation District

52413

In the Matter of the Claim for Compensation under the District of Columbia Workmen's Compensation Act

KARL F. VOEHL, Claimant,

vs.

NATIONAL ELECTRIC- SUPPLY COMPANY, Employer; Indemnity Insurance Company of North America, Insurance Carrier

Compensation Order—Award of Compensation

Case No. 322-33

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on the sixth day of April, 1930, Karl F. Voehl, the claimant above named, was in the employ of the employer

above named at 1328 New York Avenue, N. W., Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress, approved May 17, 1928, [fol. 52] entitled "An Act to provide compensation for disability or death resulting from the injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Indemnity Insurance Company of North America; that on said date the claimant herein, while enroute to the plant of the employer above named for the purpose of cleaning the warehouse in the Refrigerating Department, sustained personal injury which arose out of and occurred in the course of his employment and resulted in his disability; that the claimant's duties as manager of the said warehouse of the Refrigerating Department required that he be on duty at the warehouse from 7:30 in the morning until 5:00 o'clock in the evening, working 5½ days per week, and, in addition, to be and remain available upon telephone call for his service at all times of day and night; that the employer had placed in the claimant's home a telephone so that he could be called at any time to service refrigerators which had been sold by the employer, and to do other work, such as delivering electrical supplies for the employer with his own personal car; that several employees of the employer under the claimant's direction were held in readiness to be sent by him on any special job that might arise during business hours or during any of the twenty-four hours of the day; that the claimant herein was entitled to transportation for the use of his own car paid by the employer on a mileage basis for any special calls which he might be required to make, or service which he might be called upon to perform; that, whenever the claimant deemed it necessary to make a special trip to the employer's place of business, he was paid mileage at the rate of five cents per mile from his home to the said place of business, and was also paid at the rate of seventy-five cents per hour for the time he worked, which included the time he left his home to the time he returned thereto; that the claimant herein travelled from his home to the office and back in his own personal car during the working days of the week and was not allowed transportation for such travel; that the employer testified that the claimant was entitled to remuneration for the use of his car at

any time he might be called upon for service, or whenever in his own judgment he considered it necessary to use his own car for any special occasions other than traveling back [fol. 53] and forth from his home on week days; that on Sunday, April 6, 1930, the claimant determined that it was necessary that he should go to the warehouse of the employer to clean up certain trash that was in and around the building, part of which duty he was held entirely responsible for and part of which was a matter of his own discretion; that the object of his trip on that date was to clean up the warehouse, which was littered with trash from unpacking cases to have it in readiness for regular Monday morning inspection; that, in addition to this duty, the claimant was expecting to haul home a load of ashes to be dumped in the public highway in front of his house, and to take away some of the trash which was of necessity to be removed from the building; that the employer also testified that the claimant herein was entitled to compensation for his time from the time he left his home until he returned, and further stated that while the claimant had no specific authority to go to the warehouse on this occasion, he had done so on previous occasions and had been paid overtime and mileage for the service; that while the claimant herein was employed in these various capacities and was in pursuance of his duties as above referred to, he was driving his own car from his home enroute to the said place of employment on Sunday, April 6, 1930, when the car skidded in some soft gravel and overturned at 52nd and Central Avenue, throwing the claimant herein to the ground and injuring him; that said injury was described by the attending physician as a fracture of the spine; that due notice of the injury was given to the employer and to the Deputy Commissioner; that the claimant is entitled to medical treatment in accordance with Section 7 of the said Act; that the wages of the claimant at the time of the injury were $45.00 per week, which is in excess of the maximum amount upon which compensation is computed under the Act, and he is, therefore, entitled to compensation at the rate of $25.00 per week; that as a result of the said injury, the claimant suffered temporary total disability beginning April 6, 1930; that said temporary total disability still exists; that compensation from April 6, 1930, to January 3, 1931, both dates inclusive, a period of 39 weeks, at the rate

of $25.00 per week amounts to $975.00; that Attorney Israel J. Mendelson rendered legal services for the claimant [fol. 54] herein and for such services is entitled to a reasonable fee approved in the amount of $50.00.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award

That the employer, National Electric- Supply Company, and the insurance carrier, Indemnity Insurance Company of North America, shall pay to the claimant, compensation for temporary total disability, beginning April 6, 1930, to January 3, 1931, both dates inclusive, a period of 39 weeks, at $25.00 per week, amounting to $975.00, which amount is due and shall be paid forthwith; and shall continue to pay compensation beginning January 4, 1931, at $25.00 per week, payable every two weeks, until further order of the Deputy Commissioner; and shall pay to Attorney Israel J. Mendelson for legal services rendered in behalf of the claimant, the sum of $50.00, which amount shall constitute a lien upon and be paid out of the unpaid installments of compensation; and shall provide such medical and hospital treatment in accordance with Section 7 of the Act as the nature of the injury and the process of recovery may require.

Given under my hand at Washington, D. C. this eighth day of January, 1931.

R. J. Hoage, Deputy Commissioner, District of Columbia Compensation Act.

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, attorney — the insurance carrier and attorney for claimant, at the last known address of each as follows:

Name	Address
Mr. Karl F. Voehl.....	Seat Pleasant, Maryland.
National Electric- Supply Company	1330 New York Avenue N. W., Washington, D. C.

Name	Address
[fol. 55]	
Indemnity Insurance Co. of N. A.	C/o Ralph W. Lee & Co., 1508 L St. N. W., Wash., D. C.
Israel J. Mendelson, Attorney at Law.	Colorado Bldg., Washington, D. C.
Frank H. Myers, Attorney at Law.	Hibbs Building, Washington, D. C.

R. J. HOAGE, Deputy Commissioner.

Mailed January 8, 1931.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER FOR LEAVE TO INTERVENE—Filed February 13, 1931

* * * * * * *

Upon consideration of the motion filed herein and the consent of all parties in interest by their respective attorneys, it is by the Court this 13th day of February, 1931,

Ordered, that Karl F. Voehl, the claimant in Compensation Case #322-33, be and he hereby is granted leave to intervene in the above entitled cause, as party defendant.

Jennings Bailey, Justice.

No objection to above order.

McKenney, Flannery & Craighill, by G. B. Craighill, Tebbs & Myers, Attorneys for Plaintiff. Leo A. Rover, U. S. Attorney, Attorney for Defendant Hoage.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION TO DISMISS BILL OF COMPLAINT—Filed February 24, 1931

* * * * * * *

Now comes the Defendant Robert J. Hoage, Deputy Commissioner, United States Employees' Compensation Com-

mission, by his attorney, and moves this Honorable Court [fol. 56] to dismiss the Bill of Complaint filed herein for the following reasons; to wit:

1. That the Bill of Complaint filed herein does not entitle the Plaintiff to any relief in law or equity.

2. That the Bill of Complaint contemplates that this Honorable Court will weigh the evidence in this matter to arrive at a conclusion other than that found by the Deputy Commissioner in the face of substantial evidence to support his findings of fact as shown by the transcript of testimony annexed to the petition herein.

3. That the findings and award of the Defendant Deputy Commissioner as shown in the compensation order annexed to petitioner's Bill of Complaint are in accordance with law.

4. That the findings of the Defendant that the injuries to the employee mentioned in the Bill of Complaint arose out of and occurred in the course of his employment are supported by the evidence.

5. For such other good and sufficient reasons as may be shown.

Leo A. Rover, United States Attorney, Attorney for Defendant. John W. Fihelly, Asst. U. S. Atty.

In Supreme Court of District of Columbia

Memorandum Opinion—Filed April 7, 1931

* * * * * * *

I am of the opinion that the motion to dismiss should be sustained. Accordingly, that an order to such effect will be signed when presented in proper form.

Dated April 6, 1931.

James M. Proctor, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

FINAL DECREE—Filed April 14, 1931

* * * * * * *

This cause came on to be heard upon the plaintiff's bill of complaint and the defendants' motion to dismiss the [fol. 57] same, and argument having been heard, thereupon upon consideration thereof, it is, by the Court, this 14th day of April, A. D. 1931,

Adjudged, ordered and decreed that the said bill of complaint be and the same is hereby dismissed; and it is further

Adjudged, ordered and decreed that the costs be taxed against and payable by the said plaintiff.

James M. Proctor, Justice.

No objections as to form.

G. Bowdoin Craighill, Frank H. Myers, Attorneys for Plaintiff.

From the foregoing decree, the Plaintiff in open court notes an appeal to the Court of Appeals D. C. this 14th day of April 1931 and the penalty of the bond on appeal is hereby fixed at $100 or a deposit of $50.00 in cash in lieu thereof.

James M. Proctor, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION TO STAY PAYMENTS OF COMPENSATION—Filed April 23, 1931

* * * * * * *

Now comes the plaintiff and moves the Court to allow a stay of the payments required to be made under the compensation order issued by the defendant under date of January 8, 1931, or any order supplemental thereto which may be issued by the defendant, until the final decision of the Court of Appeals in this cause, provided the plaintiff perfects and prosecutes such appeal in accordance with the Rules of this Court and of the Court of Appeals. As grounds for said motion, plaintiff says that unless said stay

be granted, the plaintiff and/or defendant Voehl's employer will suffer irreparable damage, as shown by the affidavit and memorandum hereto attached and hereby made a part hereof.

McKenney, Flannery & Craighill, by G. B. Craighill, Attorneys for Plaintiff.

[fol. 58] To Leo A. Rover, Esq., United States Attorney, attorney for defendant Hoage; Israel J. Mendelson, attorney for defendant Voehl:

Please take notice that the points to be submitted in support of this motion, and the authorities intended to be used are attached hereto. The rules of the above entitled court require, that if you oppose the granting of the above motion, you, or your counsel, shall within five days, from the date of service of a copy of this motion upon you, or such further time as the said court may grant, or, as the parties to this suit may agree upon, file in reply with the clerk of said court, a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel for the plaintiff.

McKenney, Flannery & Craighill, by G. B. Craighill, Attorneys for Plaintiff.

Service of copy of foregoing motion and attached papers is hereby acknowledged this 23d day of April, 1931.

Israel J. Mendelson, Attorney for Defendant Voehl.
Leo A. Rover, S., United States Attorney, Attorney for Defendant Hoage.

MEMORANDUM IN SUPPORT OF MOTION TO STAY PAYMENTS OF COMPENSATION

1. Plaintiff's bill of complaint was filed on or about February 5th, 1931, under the provisions of the Compensation Act of March 4, 1927, (44 Stats. L. 1424), which was made applicable to the District of Columbia by Act of Congress approved May 17, 1928, (45 Stats. L. 600), to enjoin enforcement of a compensation order made by the defendant under date of January 8, 1931, requiring the plaintiff to pay defendant Voehl forthwith compensation for tempo-

rary total disability, beginning April 6, 1930, to January 3, 1931, a period of 39 weeks, at $25 per week, amounting to $975, and to continue to pay compensation beginning [fol. 59] January 4, 1931, at $25 per week, payable every two weeks, until further order of defendant.

2. Section 21 of said Compensation Act provides:

"The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage."

3. Pending the hearing and decision by this Court, counsel for defendant Voehl agreed to make no effort to press for the payments required to be made by defendant under said compensation order, but upon the Court entering a final decree herein on April 14th, 1931, dismissing the bill, counsel for said defendant Voehl stated that he proposed to take steps to enforce such payments in the manner authorized by said Compensation Act, which provides for the entry of a supplemental order by the defendant and the entry of judgment thereon in this Court.

4. If such supplemental order and judgment should be entered and plaintiff and/or Voehl's employer should be compelled to pay same, and to continue to make said bi-weekly payments, or incur the 20% penalty provided for failure to make such payments when due, the plaintiff and/or Voehl's employer would suffer irreparable damage, in that, in the event the award should be ordered by the Court of Appeals to be set aside, the plaintiff and/or Voehl's employer would be unable to recover back the amount of such payments as shall have been made prior to such final decision, because the defendant Voehl is a non-resident of the District of Columbia, has no property in said District and only a small amount of personal effects

and a small equity in property located in Maryland, as more fully set forth in the affidavit hereto attached and made part hereof.

[fol. 60] 5. It is respectfully requested that this motion be referred to and considered by Mr. Justice Proctor, before whom the case was fully argued, or that an oral hearing be held on this application.

McKenney, Flannery & Craighill, by G. B. Craighill, Attorneys for Plaintiff.

Affidavit in Support of Motion to Stay Payments of Compensation

* * * * * * *

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

I, E. W. Miller, Vice-President, being first duly sworn, on oath depose and say that I am Vice-President of the Indemnity Insurance Company of North America, a corporation, the plaintiff in the above entitled cause, and I am authorized to make this affidavit on behalf of said plaintiff corporation; that said corporation has caused an investigation to be made concerning the defendant, Karl F. Voehl, and as a result thereof learned that said Voehl was and is a resident of Maryland and a non-resident of the District of Columbia; that he owns no property in the District of Columbia, and so far as plaintiff has been able to discover, said Voehl owns no property in Maryland except a small equity in the dwelling in which he resides and a small amount of personal effects; that affiant has read the motion and memorandum hereto attached and verily believes that the facts therein and herein stated are true and, if it should be finally decided that said Voehl is not entitled to compensation, that plaintiff will be unable to recover the payments which it shall have made to him.

E. W. Miller. E. M. B.

Subscribed and sworn to before me this 22nd day of April, 1931. Eleanor R. Bird, Notary Public. My commission expires March 9, 1935. (Notarial Seal.)

[fol. 61] In Supreme Court of District of Columbia

Order Overruling Motion to Stay Payments—Filed May 4, 1931

* * * * * * *

Upon consideration of the motion to stay payments of compensation filed herein April 23, 1931 by the plaintiff, and after argument by counsel for all the parties, it is, by the Court, this 4th day of May, A. D. 1931,

Ordered that the said motion to stay payments of compensation be and the same is hereby overruled.

James M. Proctor, Justice.

The plaintiff notes an exception to the foregoing order overruling its motion to stay payments of compensation.

James M. Proctor.

Memorandum as to Bond

May 4, 1931.—$50 deposited for Plaintiff in lieu of bond on appeal.

In Supreme Court of District of Columbia

Assignments of Error—Filed May 7, 1931

* * * * * * *

The plaintiff, Indemnity Insurance Company of North America, a corporation, having duly noted in open Court an appeal from the decree entered in the above entitled cause on April 14th, 1931, assigns the following errors in the record and proceedings in said cause:

1. The Court erred in dismissing the Bill of Complaint;

2. The Court erred in thereby holding that the award of the defendant, Robert J. Hoage, Deputy Commissioner, described in said Bill, was in accordance with law, and that said Voehl was entitled to compensation under the provisions of the Act of Congress approved March 4, 1927,

(44 Stats. L. 1424) as applied to the District of Columbia by Act of Congress approved May 17, 1928, (45 Stats. L. 600) known as the District of Columbia Workmen's Compensation Act;

[fol. 62] 3. The Court erred in thereby holding that the injury sustained by defendant Voehl arose out of and in the course of his employment;

4. The Court erred in denying the application of plaintiff for a stay of payments of compensation pending final decision of this cause.

McKenney, Flannery & Craighill, by G. B. Craighill, Attorneys for Plaintiff.

Service of the foregoing Assignments of Error, with receipt of a copy thereof, is acknowledged this 7th day of May, 1931.

Leo A. Rover, U. S. Attorney for District of Columbia, Attorney for Defendant, Robert J. Hoage, Deputy Commissioner. J. J. Wilson, Asst. U. S. Atty., D. C. Israel J. Mendelson, Attorney for Defendant Karl F. Voehl.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed May 7, 1931

* * * * * * *

The Clerk of the Court will please prepare transcript of record on appeal in the above entitled cause and include therein the following:

1. Bill of Complaint, and all accompanying exhibits;

2. Order granting Karl F. Voehl leave to intervene;

3. Motion of defendant Hoage to dismiss Bill;

4. Memorandum opinion filed by Justice Proctor, April 7, 1931;

5. Final decree dismissing Bill, with notation of appeal, April 14, 1931;

6. Plaintiff's motion for stay of payments of compensation pending final decision, with memorandum and affidavit in support thereof;

[fol. 63] 7. Order overruling motion to stay payments of compensation with exception thereto;

8. Deposit of $50 in lieu of undertaking for costs on appeal, May 4, 1931;

9. Assignments of Error.

10. This designation.

McKenney, Flannery & Craighill, by G. B. Craighill, Attorneys for Plaintiff.

Service of the foregoing designation, with receipt of copy thereof, is acknowledged this — day of May, 1931.

Leo A. Rover, U. S. Attorney for District of Columbia, — for Defendant Robert J. Hoage, Deputy Commissioner. J. J. Wilson, Asst. U. S. Atty., D. C. Israel J. Mendelson, Attorney for Defendant Karl F. Voehl.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] Endorsed on cover: District of Columbia Supreme Court. No. 5435. Indemnity Insurance Company of North America, a corporation, appellant, vs. Robert J. Hoage, Deputy Commissioner for District of Columbia of the United States Employers' Compensation Commission, et al. Court of Appeals, District of Columbia. Filed June 30, 1931. Henry W. Hodges, Clerk.

[fol. 65] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5435

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, Appellant,

vs.

ROBERT J. HOAGE, Deputy Commissioner for District of Columbia of the United States Employees' Compensation Commission, and Karl F. Voehl, Appellees

MOTION TO STAY PAYMENTS OF COMPENSATION—Filed July 8, 1931

Now comes the appellant and moves the Court to allow a stay of the payments required to be made under the compensation order issued by the appellee Hoage under date of January 8, 1931, or any order supplemental thereto which may be issued by the said appellee, until the final decision of this Court in this cause.

As grounds for said motion, appellant says that unless said stay be granted, appellee will suffer irreparable damage, as shown by the affidavit and memorandum hereto attached and hereby made a part hereof.

G. Bowdoin Craighill, Chas. B. Tebbs, Frank H. Myers, Attorneys for Appellant.

Service of a copy of above motion, affidavit and memorandum is acknowledged this 8th day of July, 1931.

Israel J. Mendelson, Leo A. Rover, by J. I. Richards, Asst., Attorneys for Appellees.

[fol. 66] MEMORANDUM IN SUPPORT OF MOTION TO STAY PAYMENTS OF COMPENSATION

1. The question involved on this appeal is whether appellee Voehl is entitled to compensation under the Workmen's Compensation Act for injuries sustained by him on April 6, 1930, as a result of his own automobile, which he was driving, turning over while he was on his way to the warehouse of his employer, National Electrical Supply

Company. The accident occurred on a Sunday, when Voehl was several miles from the warehouse, and appellant claims that he was not "on duty" and that the injuries did not arise out of or in the course of his employment.

2. Appellant's bill of complaint was filed in the Supreme Court of the District of Columbia on or about February 5th, 1931, under the provisions of the Compensation Act of March 4, 1927, (44 Stats. L. 1424), which was made applicable to the District of Columbia by Act of Congress approved May 17, 1928, (45 Stats. L. 600), to enjoin enforcement of a compensation order made by the appellee Hoage under date of January 8, 1931, requiring the appellant to pay appellee Voehl forthwith compensation for temporary total disability, beginning April 6, 1930, to January 3, 1931, a period of 39 weeks, at $25 per week, amounting to $975, and to continue to pay compensation beginning January 4, 1931, at $25 per week, payable every two weeks, until further order of appellee Hoage.

3. Section 21 of said Compensation Act provides:

"The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence [fol. 67] submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage."

4. Pending the hearing and decision by the lower Court, counsel for appellee Voehl agreed to make no effort to press for the payments required to be made by appellant under said compensation order, but upon the Court entering a final decree on April 14th, 1931, dismissing the bill, counsel for said appellee Voehl stated that he proposed to take steps to enforce such payments in the manner authorized by said Compensation Act, which provides for the entry of a supplemental order by the appellee Hoage and the entry of judgment thereon against the insurance carrier.

5. As shown by the record filed in this Court, appellant thereupon filed a motion in the lower Court for a stay of said payments and such motion was denied. Appellees, however, agreed to take no action to enforce payment, provided appellant promptly perfected its appeal to this Court and renewed such motion here.

6. Unless this motion is granted, appellee Voehl is in a position to and threatens to enforce payment of compensation, in the manner provided by the statute. In such event, appellant would be required to pay a lump sum of $975, and pay $25 per week since January 4, 1931, and continue to make such payments every two weeks, or incur the 20% penalty provided for failure to make such payments when due. In such event, appellant would suffer irreparable damage, in that, in the event the award should be ordered by the Court of Appeals to be set aside, the appellant would be unable to recover back the amount of such payments as shall have been made prior to such final decision, because the appellee Voehl is a non-resident of the District of Columbia, has no property in said District [fol. 68] and only a small amount of personal effects and a small equity in property located in Maryland, as more fully set forth in the affidavit hereo attached and made part hereof.

7. Appellant is financially responsible, so that appellee Voehl will ultimately sustain no financial loss, if the final decision is in his favor.

G. Bowdoin Craighill, Chas. B. Tebbs, Frank H. Myers, Attorneys for Appellant.

[fol. 69] In Court of Appeals of the District of Columbia

[Title omitted]

Affidavit in Support of Motion to Stay Payments of Compensation

State of Pennsylvania,
City of Philadelphia, ss:

I, E. W. Miller, being first duly sworn, on oath depose and say that I am Vice President of the Indemnity Insurance Company of North America, a corporation, the appel-

lant in the above entitled cause, and I am authorized to make this affidavit on behalf of said appellant corporation; that said corporation has caused an investigation to be made concerning the appellee, Karl F. Voehl, and as a result thereof learned that said Voehl was and is a resident of Maryland and a non-resident of the District of Columbia; that he owns no property in the District of Columbia, and so far as appellant has been able to discover, said Voehl owns no property in Maryland except a small amount of personal effects; that affiant has read the motion and memorandum hereto attached and verily believes that the facts therein and herein stated are true and, if it should be finally decided that said Voehl is not entitled [fol. 70] to compensation, that appellant will be unable to recover the payments which it shall have made to him.

E. W. Miller. (R. R. R.)

Subscribed and sworn to before me this 7th day of July, 1931. Susie E. Weigand, Notary Public. Notary Public. My commission expires March 7, 1933. (Seal.)

[fol. 71] [File endorsement omitted.]

[fol. 72] In Court of Appeals of District of Columbia

[Title omitted]

Order Denying Motion to Stay Payments—Oct. 10, 1931

On consideration of the motion to stay payments required by compensation order of January 8, 1931, in the above entitled cause, It is ordered by the Court that said motion be and it is hereby denied.

[fol. 73] Minute entries of argument and submission, April 6th and 7th, 1932, omitted in printing.

[fol. 74] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5435

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, Appellant,

v.

ROBERT J. HOAGE, Deputy Commissioner for District of Columbia of the United States Employees' Compensation Commission, and Karl F. Voehl, Claimant, Intervening Defendant

Appeal from the Supreme Court of the District of Columbia

(Argued April 7, 1932. Decided May 9, 1932)

G. Bowdoin Craighill, Charles B. Tebbs, and Frank H. Myers, of Washington, D. C., for appellant.

Leo A. Rover, John J. Wilson, Israel J. Mendelson, of Washington, D. C., for appellees.

(Before Martin, Chief Justice; Robb, Van Orsdel, and Groner, Associate Justices)

OPINION

VAN ORSDEL, Associate Justice:

This appeal is from a decree of the Supreme Court of the District of Columbia dismissing a bill in equity filed by appellant insurance company to enjoin the enforcement of a compensation award made by defendant, Deputy Commissioner Hoage, in favor of Karl F. Voehl, an employee of the National Electric Supply Company, which company carried compensation insurance with the plaintiff corporation.

It appears that while Voehl was driving his own automobile from his home in Maryland to his employer's warehouse in Washington the automobile overturned as the result of a defect in the steering gear, causing the injuries complained of. The accident occurred on Sunday, April 6, 1930, at a point between Voehl's residence and his place of employment.

It further appears, from the evidence, that on the morning of the accident Voehl, in Company with his brother-in-

law, was on the way from his home to the warehouse of his employer to get a load of ashes which they planned to dump in a mudhole in the road near Voehl's residence. The evidence discloses beyond dispute that the main object of the [fol. 75] trip was to obtain the load of ashes. It is, however, claimed by Voehl that it was his intention when he reached the warehouse to clean up some trash which had accumulated there. It is conceded, however, that this was not part of Voehl's duties. He was "Head of the products division," which involved the management of the warehouse, supervising the unloading of refrigerators at the warehouse, unpacking, delivering, and installing them in customers' homes, and the keeping of the buildings in order with special reference to the observance of the fire regulations. He was also "Service manager," in charge of the company's twenty-four hour a day service on refrigerators in customers' homes. He had from eight to twelve men under him at the warehouse, and two service men to take care of calls. Voehl's regular hours were from 7.30 a. m. to 5.30 p. m., with an hour off for lunch. To take care of service calls the company had installed in his home a telephone, and when a call came from a customer after regular store hours it was relayed to Voehl's home. Voehl would either take care of the call personally or instruct one of the service men to do so.

In attendance on service calls outside of regular hours Voehl was allowed overtime pay from the time he left his home until his return, and if he used his own automobile he was allowed five cents per mile. No allowance was made for his automobile in going to and from work during the week days. If he deemed it necessary to go to the warehouse on Sunday he was not required to obtain special authority to do so, and when he made such a trip, if in connection with his work and in the interest of his employer, he would receive overtime pay and his mileage for use of the automobile.

Voehl was awarded compensation by Deputy Commissioner Hoage under the provisions of the longshoremen's and harbor workers' compensation act of March 4, 1927, 44 Stats. 1424, made applicable to the District of Columbia by the act of Congress of May 17, 1928, 45 Stats. 600. The bill for injunction in this case was filed under the provisions of section 21 of the compensation act on the ground that the

claim does not come within the provisions of the compensation act, averring that the commissioner's finding is "not in accordance with law," and is contrary to the evidence presented at the hearing. The sole question before the court, therefore, is whether or not Voehl's injury arose out of and in the course of his employment.

It is urged by counsel for appellee that the findings of the deputy commissioner are not subject to review by the courts where there is a conflict in the testimony—in other words, that while the courts may review the commissioner's conclusions of law they may not set aside his findings of fact merely because they might disagree with his conclusions. Section 20 of the compensation act provides: "In any proceeding for the enforcement of a claim for compensation under this act it shall be presumed, in the absence of substantial evidence to the contrary, (a) that the claim comes within the provisions of this act."

This statutory presumption, however, furnishes merely a basis for proof and not a substitute therefor. It does not shift the burden of proof from the claimant to prove by substantial evidence that the injury arose out of and in the course of his employment. To determine whether or not the commissioner's conclusions of law are correct it is necessary for the court to ascertain whether they are supported [fol. 76] by sufficient evidence. An order based upon insufficient evidence is an order contrary to law, and to determine this question a review of the evidence becomes essential. As was said in Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 92, "the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' "

In determining whether the evidence is sufficient to support the award in this case, we are confronted with the general rule applicable in compensation cases "that an injury suffered by an employee, in going to or returning from the employer's premises where the work of his employment is carried on, except in special instances not here involved, does not arise out of his employment so as to entitle him to compensation." Podgorski v. Kerwin, 144 Minn. 313; 175 N. W. 694; Nesbit v. Twin City Forge Company, 145 Minn. 286; 177 N. W. 131.

As suggested in the Minnesota cases, there are exceptions to this general rule. A common exception is where the employee is injured in and about the employer's premises or immediately adjacent thereto where the injury occurs while defendant is immediately approaching or coming upon the employer's premises. Cudahy Packing Company v. Paramore, 263 U. S. 418. The instant case does not belong within this exception, since the accident occurred several miles from Voehl's place of employment.

Another exception is where the employer furnishes transportation to his employees and an injury is suffered by the employees in going to or from his work in the vehicle furnished by the employer and under his control. This exception, however, does not apply to a case where the employee uses his own automobile, even though he may be paid by his employer for its use. Grathwold v. Nassau Point Club, 216 App. Div. N. Y. 107; 243 N. Y. 567; Artmeyer v. Mason, 220 App. Div. N. Y. 787. Another exception would arise where Voehl outside of his regular hours was called upon as service manager to take care of a service call for a customer. This exception does not apply here, since Voehl was not engaged in that sort of service when the accident occurred.

The evidence clearly established, we think, that the purpose of the trip on the Sunday morning of the accident was to procure a load of ashes for Voehl's personal use, and that if in fact he intended to remove some trash, this was merely incidental to the general purpose for which the trip was made. Voehl at the time and place of the injury was not performing any duty in the course of his employment. The cause of the accident was a defect in his own automobile over which the employer had no control and in which he was driving at the time without any order from his employer.

In McNicol's Case, 215 Mass. 497, Chief Justice Rugg in an able opinion said:

"In order that compensation may be due the injury must arise out of and also be received in the course of the employment. Neither alone is enough. * * * It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty [fol. 77] which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational

mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant."

Here there is no causal connection whatever between any duty which Voehl was required to perform and the resulting injury. The accident was in no sense a natural incident of the work of the duties imposed upon Voehl, neither did it arise out of the nature or character of his employment. To sustain the present case would amount to making the employer an insurer against all accident to his employees. To an employee injured as was Voehl in this case there is strong inducement to claim that he was on his way to perform some service incidental to his employment, but the claim advanced is in fact totally foreign to the motive which prompted the trip. In this instance the proximate cause of the accident is too remote to bring the case within the provisions of the compensation act.

The decree is reversed with costs.

Josiah A. Van Orsdel, Associate Justice.

A true copy. Test:

——— ———, Clerk Court of Appeals, D. C.

[fol. 78] In Court of Appeals of District of Columbia
April Term, 1932

* * * * * * *

No. 5435

Indemnity Insurance Company of North America, a Corporation, Appellant,

vs.

Robert J. Hoage, Deputy Commissioner for District of Columbia of the United States Employees' Compensation Commission, and Karl F. Voehl, Claimant, Intervening, Defendant

Decree—May 9, 1932

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby reversed with costs.

Per Mr. Justice Van Orsdel, May 9, 1932.

Mr. Justice Hitz took no part in the consideration or decision of this case.

[fols. 79-83] Petition for rehearing, covering four pages, filed May 26, 1932, omitted from this print. It was denied and nothing more by order of May 27, 1932.

[fol. 84] In Court of Appeals of District of Columbia

[Title omitted]

Order Denying Rehearing—May 27, 1932

On consideration of the petition for a rehearing in the above entitled cause, It is ordered by the Court that the petition be and it is hereby denied.

[fol. 85] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER OF SEVERANCE—Filed July 29, 1932

To the appellee in the above-entitled cause, to wit, Robert J. Hoage, Deputy Commissioner for the District of Columbia, United States Employees' Compensation Commission, and his attorneys and counsel of record:

Upon consideration of the motion of Karl F. Voehl for an order of severance in the above entitled cause, and of notice served upon counsel for the co-defendant in said cause, and it appearing to the Court that demand in writing has been duly made upon the above named co-defendant, to-wit Robert J. Hoage, Deputy Commissioner for the District of Columbia, United States Employees' Compensation Commission, to join in the petition of Karl F. Voehl to the Supreme Court of the United States for the allowance of a writ of certiorari for the purpose of reviewing the judgment of the Court entered herein on the 9th day of May, 1932, and that the said co-defendant or his solicitors of record have been duly notified in writing to appear and show cause why an order of severance should not be made and have failed to appear or indicate their intention of joining in said application for writ of certiorari, it is therefore this — day of August, 1932,

[fol. 86] Ordered that the said Karl F. Voehl be and it is granted a severance from his co-defendant in the above entitled cause for the purpose of filing his petition and application to the Supreme Court of the United States for allowance of a writ of certiorari to review the final judgment and decree entered in the above cause by this Court.

It is further found and ordered that the rights of Karl F. Voehl are so separate from the rights of his co-defendant, that he is entitled to and is hereby granted a severance from his co-defendant for the purpose of prosecuting his said application for allowance of a writ of certiorari by the Supreme Court of the United States to review the final judgment and decree of this Court entered in the above entitled cause.

George E. Martin, Chief Justice, Court of Appeals, D. C.

[fol. 87] [File endorsement omitted.]

[fol. 88] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed July 29, 1932

Now comes the appellee Karl F. Voehl, by his attorney and requests the Clerk to prepare a transcript of record on writ of certiorari to the Supreme Court of the United States in the above entitled cause and include therein the following:

1. Record.
2. Motion to stay payments of compensation and the order denying the said motion.
3. Argument of cause.
4. Opinion and decree.
5. Petition for rehearing and the denial of the same.
6. Order for severance.
7. This designation.

Israel J. Mendelson, Israel J. Mendelson, Attorney for Appellee, Karl F. Voehl.

Service of a copy of the foregoing designation of record acknowledged this 27th day of July, 1932.

McKenney, Flannery & Craighill, by R. A. Bogley, Attorneys for Appellant Indemnity Insurance Company of North America.

[fol. 89] [File endorsement omitted.]

[fol. 90] Clerk's certificate to foregoing transcrpit omitted in printing.

Endorsed on cover: File No. 37,012. District of Columbia Court of Appeals. Term No. 315. Karl F. Voehl, petitioner, vs. Indemnity Insurance Company of North America. Petition for writ of certiorari and exhibit thereto. Filed August 24, 1932. File No. 37,012.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 21, 1932

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
AUG 24 193
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 315

KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

ISRAEL J. MENDELSON,
Counsel for Petitioner,
213 *Colorado Building,*
Washington, D. C.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 315

KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To this Honorable Court:

The petition of Karl F. Voehl having been granted a severance from his co-defendant in the Court of Appeals of the District of Columbia, Robert J. Hoage, Deputy Commissioner for the District of Columbia, United States Employees' Compensation Commission, appears individually and separately and by his petition respectfully shows:

Statement of the Case.

This suit arises under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 14, 1927 (U. S. C. Sup. II, Title 33, Chap. 18), made applicable to the District of Columbia by the Act of May 17, 1928 (Pub. 419, 70th Congress), in the following manner:

Karl F. Voehl, the petitioner herein, while in the employ of the National Electrical Supply Company of Washington, District of Columbia, on Sunday, April 6, 1930, about 8:30 a. m. sustained injuries resulting in permanent total disability to him, by reason of an automobile accident which occurred while he was en route from his home to his employer's place of business located at 1330 New York Avenue, Northwest, Washington, District of Columbia. By reason of the exigencies of his employment it was necessary for him to proceed to the employer's premises to remove an unusual accumulation of empty refrigerator crates and other débris in order to comply with the local fire regulations and to have the premises clean and in order for a usual inspection by the employer the following day. The employee's duties related to the storage, shipping and maintenance of the employer's electric refrigerator business. Mr. Voehl had duties to perform outside of his regular working hours which were from 7.30 a. m. to 5:30 p. m. during week days. These duties consisted of, first, operating a refrigerator service to customers of his employer at any hour of the day and every day of the week, whenever so required, and a telephone was installed in his home for this purpose, and secondly, to work at his employer's place

of business at any time he deemed it necessary in his supervisory capacity, and wished to carry out or perform something for his employer, whether it be on week days before or after his regular working hours, or on Sundays.

The employee received pay from his employer for overtime service at the rate of 75 cents per hour, and mileage for the use of his own automobile at the rate of 5 cents per mile, the additional pay and mileage being calculated *from the time the employee left his home until his return thereto.*

On the day of the accident the employee, accompanied by one Hugh L. Finnegan, proceeded over the customary route to the warehouse of the employer for the purpose stated. Mr. Finnegan, who had accompanied Mr. Voehl, had anticipated assisting Mr. Voehl in removing from the employer's premises a truck load of ashes in cans which were too heavy for one person to lift. The ashes were to be used by Mr. Voehl, for his personal needs in filling in depressions in the roadway in front of his residence. The primary and major purpose of the trip, however, was to clean the warehouse and to remove the refuse. The removal of the ashes was a secondary matter which was to be accomplished after work in the warehouse had been completed.

The employee subsequent to his injury filed claim for compensation under the above cited statute on October 30, 1930, and his claim was controverted by the insurance carrier for the employer, who based its defense upon the ground that the injury did not arise out of and in the course of his employment. A hearing was

held on December 11, 1930, before the deputy commissioner, who by compensation order dated January 8, 1931, awarded compensation to Mr. Voehl for temporary total disability. On February 5, 1931, the insurance carrier applied for a statutory review of the compensation order to the Supreme Court of the District of Columbia under the provisions of section 21 (*b*) of the Longshoremen's and Harbor Workers' Compensation Act as made applicable to the District of Columbia, which limits the court to a review of a compensation order to ascertain whether it is "not in accordance with law."

The Supreme Court of the District of Columbia by decree filed April 14, 1931, affirmed the compensation order of the deputy commissioner and the carrier then appealed to the Court of Appeals of the District of Columbia. That court entered its judgment on May 9, 1932, reversing the lower court and setting aside the said compensation order.

Applications to both the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia to stay compensation payments during the proceedings were denied by both courts.

It is from the final judgment of the Court of Appeals of the District of Columbia in reversing the decision of the Supreme Court of the District of Columbia that this application is made.

Questions Presented.

The controlling question in this case is whether the Court of Appeals of the District of Columbia in view of the decision of the Supreme Court of the United

States in the cases of *Crowell, Deputy Commissioner,* v. *Benson,* 285 U. S. 22, 52 S. C. R. 285, and *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499, erred in refusing to give conclusive and final effect to the findings of fact of the deputy commissioner as contained in the compensation order of January 8, 1931, in the statutory review limiting the court upon review to the sole inquiry whether the compensation order was *"not in accordance with law"*; or in other words, whether that court erred in delving into the evidence to reweigh the facts presented before the deputy commissioner, in face of substantial evidence in support of the findings of fact contained in the compensation order.

Reasons for Granting Writ.

1. This Honorable Court in the case of *Benson* v. *Crowell, Deputy Commissioner,* 285 U. S. 22, 52 S. C. R. 285, has stated the law in statutory reviews of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act that the findings of fact of a deputy commissioner in cases not involving constitutional rights (not here involved), "the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, *shall be final"* (italics supplied). This rule of finality has been reaffirmed by this Honorable Court in the recent case of *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499. The petitioner desires the same application of the law in his case as this Honorable Court

saw fit to apply in the *L'Hote* v. *Crowell* case, since the question is identical.

2. As shown in the attached brief the Court of Appeals of the District of Columbia, reweighed the evidence before the deputy commissioner, arriving at a conclusion diametrically opposite to that reached by the deputy commissioner in face of substantial evidence in support of the findings of fact of the deputy commissioner and contrary to the rule expressed by this Honorable Court in the cases cited.

3. That the conclusion on the facts as reached by the court below is not supported by the evidence in the record.

WHEREFORE, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered 5435 and entitled on its docket "Indemnity Insurance Company of North America, a Corporation, *vs.* Robert J. Hoage, Deputy Commissioner for the District of Columbia, United States Employees' Compensation Commission, and Karl F. Voehl, claimant, intervening defendant," and that the said judgment of the Court of Appeals of the District of Columbia may be reversed, and for such other and further relief as to the Court may seem meet and proper.

ISRAEL J. MENDELSON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 315

KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction of This Court.

The jurisdiction of this Honorable Court to issue the writ prayed for herein arises and is conferred by:

1. Sec. 240-A of the Judicial Code as amended by the Act of Feb. 13, 1925, Ch. 229, sec. 1, 43 Stat. 938; U. S. Code, Title 28, sec. 347-*a*.

2. Action of the Court of Appeals of the District of Columbia in reweighing the evidence surrounding the time, place, and circumstances of the case and substituted its judgment for that of the deputy commissioner.

3. The decision of the Court of Appeals of the District of Columbia in conflict with a decision of this Honorable Court in Crowell, *Deputy Commissioner* v. *Benson,* 285 U. S. 22; 52 S. C. R. 285.

Statement of the Case.

A statement of this case is incorporated in the petition for writ of certiorari, under a similar heading.

Questions of Law Involved.

Did the Court of Appeals of the District of Columbia err in delving into the evidence to reweigh the facts presented before the deputy commissioner and to draw an inference therefrom contrary to that drawn by the deputy commissioner in face of substantial evidence in support of the findings of fact contained in the compensation order.

Specifications of Error.

1. The court below erred in reweighing the evidence taken at the compensation hearing before Robert J. Hoage, deputy commissioner, on the question whether the employee's injury "arose out of and in the course of the employment" and thereby arriving at a conclusion upon the facts in the case diametrically opposite to that reached by the deputy commissioner in his compensation order of January 8, 1931, where the deputy commissioner's findings of fact therein are supported by substantial evidence.

2. The Court of Appeals of the District of Columbia erred in refusing to follow the rule of law in such

cases which had been laid down by this Honorable Court in the case of *Crowell, Deputy Commissioner,* v. *Benson,* 285 U. S. 22; 52 S. C. R. 285, and following with summary judgment by this Honorable Court in the case of *L'Hote* v. *Crowell,* 286 U. S. 528; 52 S. C. R. 499.

Argument.

1. The Court of Appeals of the District of Columbia in its opinion in the case at bar stated that "the sole question before the court, therefore, is whether or not Voehl's injury arose out of and in the course of his employment" (R. 71).

To answer this question was to consider only the facts involved rather than to delve into delicate and fine points of law. The court in its opinion, after citing a number of cases in support of the decision, nullified their value and applicability to our present case by saying "Another exception would arise where Voehl outside of his regular hours was called upon as service manager to take care of a service call for a customer" (R. 72). The court thereby ruled, in accordance with the weight of authority and the trend of present-day thought, that even though the automobile vehicle belonged to the employee and even though on the public highway away from his employer's place of business, yet if he were on a "service call" for his employer, that situation would be another exception to the general rule and therefore be covered by the Compensation Act.

The Court while taking into consideration and putting full faith and credence in the testimony just re-

ferred to as part of the opinion, wholly disregards all the other evidence adduced at the same hearing and coming from the lips of the same witnesses, all of whom were produced on behalf of the claimant.

Digressing sufficiently to refer to some of the more salient facts pertinent to the issue herein, as disclosed by the record we find,

On pages 49-50 Mr. Voehl's statement as follows:

> "I took care of the building in accordance with the general order I had from Mr. McCrea, the general manager of the refrigeration department, that trash must not be allowed to accumulate. It was in carrying out this order that I governed my actions. The manager would inspect the warehouse every Monday morning in order to see that it was free of all trash. I naturally did my utmost to have the building clean for inspection. It was unusually busy at the building at the time I sustained my accident as we had to handle about 20 to 30 refrigerators per day. This of course caused trash to accumulate faster, making it necessary for me to come down to the building the Sunday of the accident."

Mr. Voehl's immediate superior, Mr. McCrea, in answer to a number of questions, said:

> "Mr. Voehl had charge, first of all, of the maintenance and operation of the warehouse, and, second, he was charged with seeing that service on refrigerators in operation in customers' homes, etc., was maintained. We called it 'Head of the products' division' " (R. 21).
>
> "Mr. Voehl supervised the unloading of the refrigeration units, refrigerators, placing them

in a warehouse, unpacking, examination before delivery, delivery, and installation in customers' homes" (R. 22).

"* * * If there was anything that needed to be done we could absolutely rely that he would do it and, as far as specific or detailed instructions go, it is my own policy not to give men specific instructions but to let the men do the job and I look for the results more than what we actually tell them to do" (R. 24).

2. Was the main object and primary reason for Mr. Voehl's trip to clean up and put the warehouse in order and not to obtain a load of ashes?

The deputy commissioner answered this supplemental question in the affirmative, thereby ordering an award of compensation. The answer to this question was arrived at after a hearing held in regular form before him, after having had an opportunity to observe, hear, and examine the various witnesses appearing before him, and after the claimant and insurance carrier introduced into the hearing all the testimony they cared or possibly could.

The Court of Appeals in its answer, after reweighing the evidence presented before the deputy commissioner, says "The evidence clearly established, we think, that the purpose of the trip on the Sunday morning of the accident was to procure a load of ashes for Voehl's personal use, and that if in fact he intended to remove some trash, this was merely incidental to the general purpose for which the trip was made" (R. 72).

The court continued and in the last paragraph of its opinion states:

> "To an employee injured as was Voehl in this case there is strong inducement to claim that he was on his way to perform some service incidental to his employment, but the claim advanced is in fact totally foreign to the motive which prompted the trip" (R. 73).

It is respectfully urged that there is nothing whatever in the record in this case (nor has the insurance carrier urged the matter) which demonstrates bad faith on the part of the petitioner Voehl. There is not a suggestion in the record that this was anything other than a *bona fide* claim. Mr. Voehl was very frank in his statement as to the purpose of the trip in that he did refer to his intentions to perform a personal errand after he had completed his duties for his employer. His employer did not question his integrity but specifically states:

> "I never questioned Voehl's overtime one bit. I have checked it enough to know that he was honest in his statements and if he put in an overtime charge for five hours or six hours or three hours that week, I am certain it was correct" (R. 24).

It is submitted, therefore, that the record contains competent and substantial evidence that Mr. Voehl was on an errand for his employer when injured and stands undisputed by the insurance carrier, and certainly sufficient to justify the inference drawn by the deputy commissioner; that where any evidence ap-

pears to support a finding of fact, under the law, the conclusions of the deputy commissioner are to be regarded *final* and *conclusive.*

3. With respect to the finality of the deputy commissioner's findings of fact, the Court's attention is respectfully directed to the case of *Crowell, Deputy Commissioner,* v. *Benson,* 285 U. S. 22, 52 S. C. R. 285, which specifically recognizes the finality of fact findings of a deputy commissioner where supported by evidence. This case passes on the very act under consideration in the present case. This Honorable Court (passing upon the Longshoremen's Act as it is applied to the admiralty and maritime jurisdiction of the United States) calls attention to the finality of fact findings of a deputy commissioner in all cases excepting those involved "jurisdictional" or "constitutional" rights (not here urged or involved) in the following language:

> "Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act the findings of the deputy commissioner, supported by evidence and within the scope of his authority, *shall be final.*" (Italics supplied.)

This rule of finality has been reaffirmed by this Honorable Court in the recent case of *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499. It is the desire of the petitioner that the

same application of the law be made in his case as in the *L'Hote* v. *Crowell case* since the questions are identical.

Conclusion.

This Honorable Court has already passed upon the question here involved, namely, the finality of the findings of fact of a deputy commissioner in a compensation case where supported by evidence, once with considerable discussion in the case of *Crowell, Deputy Commissioner* v. *Benson,* 285 U. S. 22, 52 S. C. R. 285, and again in a summary manner in the case of *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499.

The Court of Appeals of the District of Columbia in the present case has made independent inquiry into the facts surrounding the time, place and circumstances of Mr. Voehl's accident and injury and has arrived at a conclusion from these facts that the injury did not "arise out of and in the course of his employment." The deputy commissioner before whom the case was heard found an injury "arising out of and in the course of his employment" and his findings are supported by substantial evidence.

The conclusion which is necessarily reached is that the Court of Appeals erred in reweighing the evidence in this case. The evidence in this case does not even support the inference drawn by the Court in its conclusions upon the question whether the injury arose out of and in the course of the employment.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its

supervisory powers in order that a rule of law heretofore expressed by this Honorable Court may not be digressed from by a lower court and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the Court of Appeals of the District of Columbia and finally reverse it.

Respectfully submitted,

ISRAEL J. MENDELSON,

Counsel for Petitioner.

(2615)

FILE COPY

FILED
DEC 14 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 315

KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT.

BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 315

KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT.

The above entitled cause is now before this Honorable Court on writ of certiorari granted November 21, 1932.

BRIEF OF PETITIONER.

Statement of Case.

This case arises under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (U. S. C., Title 33, Chap. 18), made applicable to employees in certain employments in the

District of Columbia by the Act of May 17, 1928 (D. C. Code, Title 19, Chap. 2), which will hereinafter be referred to as the compensation law.

Karl F. Voehl, the petitioner herein, while in the employ of the National Electrical Supply Company of Washington, D. C., on Sunday, April 6, 1930, at about 8:30 a. m., sustained personal injuries resulting in permanent total disability to him, by reason of an automobile accident which occurred while he was en route from his home to his employer's place of business located at 1330 New York Avenue, N. W., in the city of Washington, D. C. By reason of the exigencies of his employment it was necessary for him to proceed from his home to his employer's premises for the purpose of removing an unusual accumulation of empty refrigerator crates and other debris at the employer's warehouse, in order to comply with the local fire regulations and to have the premises clean and in proper order for the usual inspection thereof by the employer the following day.

The employee's duties related to the storage, shipping and maintenance of the employer's electric refrigerator business and warehouse. Mr. Voehl's ordinary duties required him to report at his employer's premises during the regular week days, when his hours of service were fixed from 7:30 a. m. to 5:30 p. m. In addition to his regular week day employment for the employer Mr. Voehl was required to perform duties outside of the regular hours stated. These duties consisted of, first, the maintenance of a refrigerator service to customers of the employer at any hour of the day

or night, whenever so required or necessary, and the employer paid for the maintenance of a telephone in Mr. Voehl's home for the purpose of facilitating this service. Secondly, Mr. Voehl was required to perform service at his employer's place of business at any time whenever directed to do so or whenever Mr. Voehl deemed it necessary in his supervisory capacity. He also performed other duties for the employer at the employer's premises whenever such occasion arose, on work days before or after his usual working hours or on Sundays, such duties being in line with his general employment.

Mr. Voehl received pay from his employer for such overtime services as described at the rate of 75 cents per hour, and mileage for the use of his own automobile at the rate of five cents per mile. This additional pay and mileage were allowed and calculated *from the time the employee left his home until his return thereto* following the completion of the duty.

On the day of the accident, which was Sunday, Mr. Voehl found it necessary by reason of the exigencies of his employment to proceed over the customary route from his home to the warehouse of the employer, where he was going directly to clean the warehouse and to remove a large accumulation of empty refrigerator crates and other debris. It was necessary that he perform this mission in order to have the premises in order for inspection on the next day. The debris which had accumulated at the warehouse by reason of an unusual congestion, due to the press of business on the preceding Saturday, had not been removed.

Mr. Voehl was accompanied by one Hugh L. Finnegan, his brother-in-law, who had accompanied the employee for the sole purpose of assisting in removing from the employer's premises a truck load of ashes in cans which were too heavy for one person to lift. The ashes were to be used by Mr. Voehl for his personal needs in filling in depressions in the roadway in front of his home. The testimony in the case shows conclusively that the primary and major purpose of the trip on this particular Sunday morning was to clean the warehouse and to remove all the debris. The removal of the ashes, as shown by the evidence, was a secondary matter which was to be accomplished *after the work in the warehouse had been completed.* While on the direct route from his home to his employer's premises the automobile which Mr. Voehl was operating became unmanageable due to some mechanical defect or road condition and the car overturned, with the result that Mr. Voehl sustained a fracture of the spine with complete paralysis below the lumbar region. It appears that this disability is incurable and that Mr. Voehl will be permanently and totally disabled for life.

Subsequent to his injury, Mr. Voehl filed a claim for compensation on October 30, 1930, with R. J. Hoage, deputy commissioner for the District of Columbia, United States Employees' Compensation Commission. His claim was controverted by the insurance carrier representing the employer, which based its defense to the claim on the ground that the injury did not "arise out of and in the course of employment." A hearing was held on December 11, 1930, before the deputy commissioner, who thereafter filed a compensation order

pursuant to the compensation law on January 8, 1931, awarding compensation to Mr. Voehl for the disability which he had sustained. On February 5, 1931, the insurance carrier applied for a *statutory review* of the compensation order to the Supreme Court of the District of Columbia, under the provisions of section 21 (*b*) of the Longshoremen's Act. This section limits such review to the determination whether the compensation order is "not in accordance with law."

The Supreme Court of the District of Columbia, by decree filed April 4, 1931, affirmed the said compensation order and the carrier then appealed to the Court of Appeals of the District of Columbia, where the decree of the lower court was reversed by judgment entered May 9, 1932, setting aside the said compensation order.

Applications were made both to the Supreme Court of the District of Columbia and to the Court of Appeals to stay compensation payments during said proceedings and both courts denied the applications.

It is from the final judgment of the Court of Appeals of the District of Columbia in reversing the decision of the Supreme Court of the District of Columbia that writ of certiorari was applied for and granted.

Question Presented.

Did the Court of Appeals of the District of Columbia err in delving into the evidence to reweigh the evidence presented before the deputy commissioner and drawing an inference therefrom contrary to that drawn by the deputy commissioner, in the face of substantial evi-

dence in the record in support of the findings of fact contained in the compensation order, and thereafter setting aside the said order?

Specifications of Error.

1. The court below erred in reweighing the evidence taken at the compensation hearing before Robert J. Hoage, deputy commissioner, on the question whether the employee's injury "arose out of and in the course of the employment" and then arriving at a conclusion upon the *facts* in the case diametrically *opposite* to that reached by the deputy commissioner in his compensation order of January 8, 1931, where the deputy commissioner's findings of fact therein are supported by substantial evidence.

2. The Court of Appeals of the District of Columbia erred in refusing to follow the rule of law in such cases, which has been laid down by this Honorable Court in the case of *Crowell, Deputy Commissioner* v. *Benson*, 285 U. S. 22, 52 S. C. R. 285, and followed with summary judgment by this Honorable Court in the case of *L'Hote* v. *Crowell, Deputy Commissioner*, 286 U. S. 528, 52 S. C. R. 499, on the same compensation law now involved.

Statutes Involved.

The following excerpts from the compensation law are given for the convenience and information of the court:

> Section 2. (2) "The term 'injury' means accidental injury or death arising out of and in the

course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee beause of his employment." (Sec. 902 (2) U. S. C. Title 33, Chap. 18.)

Section 21. (*b*) "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage." (Sec. 921 (*b*) U. S. C. Title 33, Chap. 18.)

Argument.

1. The Court of Appeals of the District of Columbia in its opinion in the case at bar stated that "the sole question before the court, therefore, is whether or not Voehl's injury arose out of and in the course of his employment" (R. 71).

The court below with reference to this question attempted to turn into a question of law a matter which your petitioner respectfully asserts is a *question of fact*. The question of fact involved is this—what was the purpose and object that Mr. Voehl had in mind when he proceeded from his home to his employer's place of business on Sunday, April 6, 1930? Your petitioner respectfully asserts that the deputy commissioner's finding of fact to the effect that Mr. Voehl was proceeding to his place of employment to perform a mission for his employer is supported by substantial evidence. Conversely, if the evidence did not show that Mr. Voehl was proceeding on a mission for his employer but upon a *mission of his own* to obtain a load of ashes, your petitioner is in full agreement with the insurance carrier's contention that the injury did not arise out of and in the course of employment.

For the information and convenience of the court the following excerpts are taken from the compensation order filed January 8, 1931, by the deputy commissioner, relative to the principal question in this case; namely, the purpose of Mr. Voehl's trip to his employer's premises:

"That on said date the claimant herein, while en route to the plant of the employer above named for the purpose of cleaning the warehouse in the refrigerating department, sustained personal injury which arose out of and occurred in the course of his employment and resulted in his disability; * * * that on Sunday, April 6, 1930, the claimant determined that it was necessary that he should go to the warehouse of the employer to clean up certain trash that was in and around the building, part of which duty he was held entirely responsible for and part of which was a matter of his own discretion; that the object of his trip on that date was to clean up the warehouse, which was littered with trash from unpacking cases, to have it in readiness for regular Monday morning inspection; that in addition to this duty the claimant was expecting to haul home a load of ashes to be dumped in the public highway in front of his house, and to take away some of the trash which was of necessity to be removed from the building * * *" (R. 53, 54).

The Court of Appeals of the District of Columbia in its opinion of May 9, 1932, with respect to the question of fact involved, states:

"It further appears, from the evidence, that on the morning of the accident Voehl, in company with his brother-in-law, was on the way from his home to the warehouse of his employer to get a load of ashes which they planned to dump in a mud hole in the road near Voehl's residence. The evidence discloses beyond dispute that the main object of the trip was to obtain the load of ashes. It is, however, claimed by

> Voehl that it was his intention when he reached the warehouse to clean up some trash which had accumulated there. * * * The evidence clearly established, we think, that the purpose of the trip on the Sunday morning of the accident was to procure a load of ashes for Voehl's personal use, and that if in fact he intended to remove some trash, this was merely incidental to the general purpose for which the trip was made. Voehl at the time and place of the injury was not performing any duty in the course of his employment" (R. 69, 70-72).
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> * * * * * * *
>
> "To an employee injured as was Voehl in this case there is strong inducement to claim that he was on his way to perform some service incidental to his employment, but the claim advanced is in fact totally foreign to the motive which prompted the trip" (R. 73).

It will be seen by comparing the findings of fact of the deputy commissioner with the statement of *facts* by the court it is obvious that the court has reached a fact conclusion from the evidence diametrically *opposite* to the fact findings of the deputy commissioner. This your petitioner respectfully contends in the face of this record is error.

This Honorable Court in the case of *Crowell, Deputy Commissioner* v. *Benson,* 285 U. S. 22, 52 S. C. R. 285, specifically recognizes the finality of fact findings of a deputy commissioner, where supported by evidence. In the Benson case the court passed on the very Act now under consideration, in so far as it applied to the

admiralty and maritime jurisdiction of the United States. Under section 21 (*b*) of the Longshoremen's Act, quoted above, the Supreme Court of the District of Columbia had before it the present case upon *review*, and its inquiry under the law and the decisions of this Honorable Court was limited to the determination whether the compensation order was "not in accordance with law." Your petitioner respectfully states that in accordance with the decisions of this Honorable Court above and hereinafter referred to, and the law generally, which is illustrated in innumerable cases cited in the American Digest System, Key number 417 (7) under "Master and Servant", the rule is laid down that in *review* of the action of a compensation board or administrator the court has no authority (with the exceptions noted in the *Crowell* v. *Benson* case, *supra*, not here applicable for the reason hereinafter stated) to reweigh or redetermine questions of fact. The same rule does not authorize the court to substitute its judgment for that of the trial deputy commissioner on questions of fact. In a judicial review your petitioner contends that the court is limited on fact questions involved to the determination whether there existed before the deputy commissioner any substantial evidence in support of his findings of fact. If the findings are so supported by evidence they become final and conclusive upon the court. The court, however, may in proper cases find an absolute lack of evidence to support the findings of fact and may in such cases hold that the compensation orders being unsupported by evidence are "not in accordance with law", or, where the findings of the deputy com-

missioner are arbitrary and unreasonable, by being opposed to the uncontradicted testimony susceptible of only one inference, such arbitrary or capricious action might warrant a compensation order being held to be "not in accordance with law."

In *Crowell* v. *Benson, supra,* this Honorable Court laid down the rule as follows:

> "Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act the findings of the deputy commissioner, supported by evidence and within the scope of his authority, *shall be final.*" (Italics supplied.)

This rule of finality has been reaffirmed by this Honorable Court in the recent case of *L'Hote* v. *Crowell, Deputy Commissioner,* 286 U. S. 528, 52 S. C. R. 499, also involving the Longshoremen's Act. in the *L'Hote* case this court reversed the judgment of the circuit court of appeals because it affirmed the district court in retrying the facts relative to the dependency of a compensation claimant, and directed the lower court to affirm the award of the deputy commissioner. This Honorable Court in effect in that case held that the findings of fact of a deputy commissioner relative to the facts of dependency shall be regarded as final and conclusive. Moreover, in the case of *Crowell* v. *Benson, supra,* this Honorable Court has already signified that findings of fact in a situation such as is involved in the present case are for the

determination of the deputy commissioner. The pertinent language of the opinion of the Chief Justice reads:

> "The Act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the *circumstances*, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards." (Italics supplied; 285 U. S. 54.)

In addition to the two cases cited above the court's attention is respectfully directed to the case of *Dahlstrom Metallic Door Company* v. *Industrial Board of New York*, affirming 231 App. Div., as affirmed by 256 N. Y. 199, Per Curiam report in 284 U. S. 594, wherein this Honorable Court followed the principle set forth in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, the principle being that in compensation cases the findings of fact of a deputy commissioner or board are to be regarded as final and conclusive upon the court on review where supported by any substantial evidence, and that the court has no independent authority to reweigh the evidence or try the case *de novo*.

It is noted that in *Crowell* v. *Benson*, *supra*, this Honorable Court stated in substance that the findings of fact of the deputy commissioner under the Longshoremen's Act are final and conclusive upon the court on review of a compensation order in every case with the following exceptions: that where fundamental or jurisdictional questions are involved the findings of fact of the deputy commissioner are not final and that

the district court may independently inquire into the facts involved in these fundamental or jurisdictional questions by a trial *de novo* of the facts.

This Honorable Court in its opinion held that the "fundamental" or "jurisdictional" questions are limited to (1) whether the injury occurred upon the navigable waters of the United States, and (2) whether the relationship of master and servant exists. These factors must exist as "a condition precedent to the operation of the statutory scheme."

Applying the *Crowell* v. *Benson* case, *supra,* to the present case, your petitioner respectfully states that the general rule therein expressed, and heretofore recognized in the two cases preceding this case above cited, and the *L'Hote* v. *Crowell* case, *supra,* following it, relative to the finality of findings of fact of a deputy commissioner, applies with equal force to the present case.

The exception to the general rule given in the *Crowell-Benson* case; namely, the right of trial *de novo* on the question of relationship of master and servant, and whether injury occurred on the navigable waters, is clearly not applicable in the District of Columbia. The right of trial *de novo* in these instances is necessary to enable the *constitutional* Federal district courts to exercise their independent jurisdictions given to them directly by the Constitution which vests in such courts independent jurisdiction over matters that fall within the admiralty and maritime jurisdiction of the United States (Const. Art. III, sec. 2; *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 138), and the general au-

thority of Congress does not extend to deprive these courts of their inherent prerogative to hear *de novo* the facts upon which their jurisdiction rests.

Congress in legislating for the District of Columbia can do so without restriction, except in so far as the fundamental rights of citizens generally are concerned. Congress is not required to stop to examine the Constitution to determine whether or not it is transgressing upon the authority of a constitutional court where legislating concerning local affairs in the District of Columbia. Therefore, in pursuance of this plenary jurisdiction conferred upon it Congress has seen fit to create local *legislative* courts, of which the Supreme Court of the District of Columbia and the Court of Appeals, D. C., when passing upon matters of local concern, are representative.

The question whether the Supreme Court of the District of Columbia is a legislative court created by Congress, or a constitutional court within the meaning of the Federal Constitution was definitely decided in the case of *Ex Parte Bakelite Corporation,* 279 U. S. 438 (1929), in which this Court said:

> "These courts (referring to courts of the District of Columbia) this Court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district made the seat of government of the United States, are *legislative* rather than *constitutional* courts." (Emphasis supplied.)

In *Atlantic Cleaners and Dyers, Inc.,* v. *United States,* 52 S. C. R. 607, 609, decided May 23, 1932, Mr.

Justice Sutherland on commenting upon the power of Congress to legislate for the District of Columbia, said:

> "The power exercised, and which gives vitality to the provision, is the plenary power to legislate for the District of Columbia, conferred by Art. 1, sec. 8, cl. 17 of the Constitution. Under that clause Congress possesses not only every appropriate national power, but, in addition, all the powers of legislation which may be exercised by a State in dealing with its affairs, so long as other provisions of the Constitution are not infringed."

It follows therefore that the general rule expressed in *Crowell* v. *Benson, supra,* to the effect that findings of fact of a deputy commissioner are *final* and *conclusive* upon the court in review proceedings is applicable to the District of Columbia and that the right of trial *de novo* given only in cases where fundamental or jurisdictional questions are involved (limited to (1) master and servant relationship, and (2) whether injury occurred on the navigable waters) is limited and can apply only to cases arising under the admiralty and maritime jurisdiction of the United States before *constitutional* Federal courts. The reason for the right to a trial *de novo* in admiralty matters does not exist with respect to cases in the District of Columbia. Therefore, the final conclusion, upon review of the law as expressed by this Honorable Court and the many inferior courts in the United States, is that the Congress has placed in the deputy commissioner for the District of Columbia the authority to pass *finally* on *all* questions of fact, leaving questions of law for the court to decide. The courts, upon review, are required by this rule of

law to give conclusive effect to all fact findings where supported by any substantial evidence.

Based upon the rule of law above expressed your petitioner contends that all he is required to show to the court upon review of a compensation order is that there is some substantial evidence to support the findings of fact of the deputy commissioner.

For the purpose of showing that there is evidence in support of the findings of fact of the deputy commissioner contained in the transcript of record without attempting to review the evidence as a whole your petitioner sets forth below some brief excerpts from the record:

Statement by Mr. Voehl:

> "I took care of the building in accordance with the general order I had from Mr. McCrea, the general manager of the refrigeration department, that trash must not be allowed to accumulate. It was in carrying out this order that I governed my actions. The manager would inspect the warehouse every Monday morning in order to see that it was free of all trash. I naturally did my utmost to have the building clean for inspection. It was unusually busy at the building at the time I sustained my accident as we had to handle about 20 to 30 refrigerators per day. This of course caused trash to accumulate faster, making it necessary for me to come down to the building the Sunday of the accident." (R. 49-50.)

Statement by Mr. McCrea, general manager:

> "Mr. Voehl had charge, first of all, of the maintenance and operation of the warehouse,

and, second, he was charged with seeing that service on refrigerators in operation in customers' homes, etc., was maintained. We call it 'Head of the products' division' " (R. 22).

"Mr. Voehl supervised the unloading of the refrigerator units, refrigerators, placing them in a warehouse, unpacking, examination before delivery, delivery, and installation in customers' homes" (R. 22).

"* * * If there was anything that needed to be done we could absolutely rely that he would do it and, as far as specific or detailed instructions go, it is my own policy not to give men specific instructions but to let the men do the job and I look for the results more than what we exactly tell them to do" (R. 24).

"* * * I know that the business for the first week in April was approximately three times what it had been for the weeks preceding it, immediately preceding that; in the three days prior to the date of accident we had unpacked a total of some sixty refrigerators. Now that exact figure is subject to correction, that is merely approximate. Now, sixty refrigerators and sixty machines produce 120 crates, and a refrigerator is packed in a large heavy board crate, or were at that time; I know from previous experience that the unpacking of that amount of material and the delivering of that amount of material is always attended by a large accumulation of trash and litter which must be cleared up" (R. 26).

"I do know that two or three days prior to the accident I had called his attention to the necessity of keeping it better cleared up" (R. 26).

"* * * Well, Voehl was one of the most conscientious employees I have ever known. Naturally, he could not be with us sixteen years without having been so and we gave him the job and expected him to do it."

"* * * I never questioned Voehl's overtime one bit. I have checked it enough to know that he was honest in his statements and if he put in an overtime charge for five hours or six hours or three hours that week, I am certain it was correct" (R. 24).

Mr. Finnegan testified:

"Well, he came over to the house that Sunday morning and told me he would like me to go with him to the warehouse, that he hated to bother me so early in the morning but that he had to move the ashes there and needed help for that but he could clean up the warehouse, he said, and he said he did not need any help for that. That is the reason he asked me to accompany him" (R. 14).

At this juncture reference is made to the statement in the opinion of the Court of Appeals of the District of Columbia to the effect that an employee injured as was Voehl there is strong inducement to claim that he was on his way to perform some service incidental to his employment. It is respectfully called to the Court's attention that there is nothing whatever in this record (nor has the insurance carrier urged the matter) which demonstrates bad faith on the part of the petitioner. There is not a suggestion in the record that this was anything but a *bona fide* claim. Mr. Voehl was very frank in his statement as to the pur-

pose of the trip in that he did refer to his intentions to perform a personal errand after he had completed his duties for his employer. His employer did not question his integrity as may be seen from the excerpt of testimony above quoted.

In conclusion on this point your petitioner respectfully states (1) that where there is any evidence to support the findings of fact of the deputy commissioner under the rule expressed above, the findings of fact should be regarded as final and conclusive, (2) that there is evidence in the record that the purpose of Mr. Voehl's trip to his employer's premises on the day of his injury was to perform a duty for his employer entirely within the scope of his employment, and (3) under syllogistic reasoning this Honorable Court should hold that the deputy commissioner's findings of fact on this point are conclusive and final.

It suffices to say that the reversal of the Supreme Court of the District of Columbia by the Court of Appeals appears to be principally based upon the gratuitous finding by the appellate court, which your petitioner maintains is not supported by the evidence, to the effect that Voehl was not going upon a mission for his employer, whereas the evidence clearly shows that he was on such mission.

2. As a proposition of law, injuries sustained by employees while en route to their regular place of employment during the regular week day service, where they have specific places to report for duty, at specific times, are not within the purview of the compensation law for injuries sustained while so en route. How-

ever, this general rule has its many exceptions, one of which has already appeared before this Honorable Court in workmen's compensation cases.

This point of law was discussed in the opinion of the court below but was apparently not necessary for the court's consideration in reaching its conclusion in this case, for the reason that the court reached a *fact conclusion* that Voehl was on a personal errand, hence the rule of law in cases where an employee is injured en route on a mission for his master was neither apparent nor a necessary question involved for the determination of the present case. However, since your petitioner feels that this Honorable Court may have this further point to consider, should it find that the deputy commissioner's conclusions of fact should be supported, it is deemed advisable to make reference thereto.

Some of the exceptions to the general rule that an employee injured while on his way to work is not within the purview of the compensation law, are set forth below. It is not practical to classify these exceptions into any general class or classes, since fact situations from time to time arise which require the modification or extension of the rule covering these exceptions, and each case more or less depends upon the merits of its own facts.

(*a*) Where an employee while en route to his place of employment to begin his day's work is required to pass across a dangerous approach to his employer's premises, he may be compensated for injuries sustained en route to work. This principle is illustrated

in *Cudahy Packing Company* v. *Parramore*, 263 U. S. 418, 44 S. C. R. 53, where an employee had to cross railroad tracks outside of, but adjacent to, his employer's premises. In that case it was held that an injury sustained while en route to work under such circumstances was compensable. In another case involving this similar principle, namely *Bountiful Brick Company* v. *Giles*, 276 U. S. 154, this court held that the compensation law applied to the case of an employee who, while on his way to work, "was killed by a locomotive on a public crossing on a railroad adjacent to his employer's factory."

(*b*) Where the employee is furnished transportation at the expense of the employer, he is under the protection of the compensation law at all times going from home to work or returning home from work while in such conveyance. Thus in *Swanson* v. *Lathem & Crane* (Conn. 1917), 101 Atl. 492, where one of the workmen had an automobile in which he transported other workmen under an arrangement with the employer, to and from work, and the workmen were killed when the automobile collided with a train while returning from work one evening it was held that death arose out of and in the course of employment.

In *Littlefield's* case (Maine 1927), 136 Atl. 724, where a carpenter agreed with his employer to transport fellow workmen to and from work, injuries sustained in the overturning of the automobile while en route home arose out of and in the course of the carpenters' employment.

In *Scalia* v. *American Sumatra Tobacco Company*, 105 Atl. 346, the court states the following rule:

> "That the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right permitted, to use by virtue of that contract."

See also *State, ex rel, McCarthy Brothers Company* v. *Circuit Court of Hennepin County*, 169 N. W. 274; *Rock County* v. *Industrial Commission*, 200 N. W. 657 (Wis. 1924); *Vogel's* case, *Duerte's* case, *Antonio's* case (Mass. 1926), 153 N. E. 175; *Jett* v. *Turner* (1926), Supreme Court of Alabama (1, Div. 418), 215 Ala. 352.

(*c*) Where the employee is paid from the time he leaves home until his return thereto he is entitled to compensation for injuries sustained from the moment he leaves his home until he returns thereto.

In *Cymbor* v. *Binder Coal Company* (Pa. 1926), 132 Atl. 363, the employee was required to make nightly trips to his employer's mine in order to start the pumps so that water in the mine would be removed when work was resumed. The employee lived about 1,200 feet from the mine and walked to and from the mine on the tracks of the Pennsylvania Railroad Company. About ten o'clock in the evening employee took his lantern, went from his home to the mine, started

the pumps, and while returning on the tracks was killed by a railroad engine. He was paid by the hour for his work in the mine during the day and received extra pay for starting the pumps at night. For the latter he kept his own time and turned it in every two weeks, it being inferred that he charged the actual time used from his home on the errand until his return thereto. It was held that he was in his master's business not only while starting the pumps but while travelling to and from home.

In *Ohmen* v. *Adams Brothers* (Conn. 1929), 146 Atl. 825, an employee lived in a town some distance from his place of employment and was injured while returning to work after having received permission to go to his home town to vote. His pay started as usual at 8 a. m., which was the hour his employment usually began, while the polls did not open until 9 a. m. He was proceeding en route to his place of employment and had reached a point about 5 miles from his employer's premises at 9:20 a. m. when he was injured. The injury was held compensable since the employee was in a pay status at the time his injury was received.

(*d*) Where an employee sets about on a special errand for the employer he is entitled to protection of the compensation law from the time he leaves his home until his return thereto regardless of whether or not he is paid extra for such special service.

In *Consolidated Underwriters* v. *Breedlove*, 265 S. W. 128 (Tex. 1924), a mechanic subject to call at any time who was sent out to see about a battery and at the same time on his way back stopped for lunch and

was injured after lunch while on his way to his employer's business place, was held within the compensation law.

In *Reese* v. *National Surety Company of New York* (Minn. 1925), 203 N. W. 442, the employee was required to go about the city after office hours. One night he was sent upon a special errand which required his presence several miles from the office until 10 o'clock at night. He was returning to his home when injured. It was held that under the showing he was at the time of his injuries where his duties called him and therefore entitled to compensation for the injuries sustained.

In *State Compensation Insurance Fund* v. *Industrial Accident Commission of California* (1928), 264 Pac. 514, the decedent was an outside salesman and he was required to report each morning for duty at the company store. On the day of his death he was instructed by one of the company's executives to return to the store that night after dinner to unlock the door to admit an electrician. In accordance with his usual custom decedent left the store on the date mentioned at about 5 o'clock, went home to his dinner, and returned to the store, allowing the electrician to enter, where he remained from 7 until 10 p. m. He then locked the store, boarded a street car, and on his way home, while transferring from one car to another, slipped and fell on the street sustaining injuries from which he died. The court in sustaining the award in part states:

> "The rule generally known as the going and coming rule has been considered and applied by

this court in numerous cases where the person injured was employed to perform service at or in a particular plant or upon particular premises, and the injury claimed to be compensable was inflicted while he was going to or returning from his place of employment or where the employee had left the place of employment on an errand personal to himself. The general rule subject to many exceptions, however, is that injuries inflicted under the foregoing circumstances are not compensable. * * * As the Commission held, the evidence here proves that this was not the ordinary case of an employee being injured while following the usual custom of going to or coming from the place where he works; on the contrary it shows beyond doubt that decedent was injured while returning from a special errand which he was performing under the direction of his employer and which required him to leave his home at night after regular working hours and called for a service outside of his regular duties as a salesman, the sole purpose of which was to help his employer in the latter's business; and it was because of the relationship of employer and employee that one requested the service and the other rendered it."

In *Merriman* v. *Manning, Maxwell & Moore, Inc.* (Mich. 1930), 232 N. W. 409, a sales engineer was injured while he was on his way to his employer's office on Sunday morning. His superior on a previous day had instructed the employee to meet him at the employer's office on the Sunday morning for conference with reference to a certain business trip. While on the way to the office from his home an accident occurred

resulting in the death of the sales engineer, which was held compensable. See also *Messer* v. *Manufacturers' Light & Heat Company* (Pa. 1919) 106 Atl. 85; *Maryland Casualty Company* v. *Long* (Tex. 1928) 9 S. W. (2d) 458.

(*e*) Where the employee has no fixed place of business such as a salesman, he is covered by the compensation law while en route from his home to his first customer or while en route from his last customer.

(*f*) Where an employee is obliged to make emergency calls or to perform service at his employer's place of business at times other than during the regular working hours, he is under the protection of the compensation law from the time he leaves home until his return thereto.

Thus, in *Linnane* v. *Ætna Brewing Company*, 99 Atl. 507, it was held that where an employee by reason of the terms of his employment is subject to emergency calls he is covered by the compensation act from the time he leaves home in response to such calls.

In *Gibbs* v. *Macey & Company*, 214 App. Div. 335; 242 N. Y. 551, a house detective for a large department store left her home on a Sunday morning and proceeded to court to attend trial of a shoplifting case. On her way back home a motorcycle ran her down, fracturing her wrist. The carrier for the employer contended that her work ended when she left the court. The appellate division affirmed the award, stating: "Of that journey to the court the homeward journey was a necessary counterpart." Upon further appeal

the New York Court of Appeals affirmed the appellate division without opinion.

In *Martin* v. *Card & Company*, 193 App. Div. 6, the employee whose business it was on Sundays to go to the employer's factory to look after fires, lights, etc., and to see that things were in working order for Monday, used his own personal car on a Sunday to go after a spark plug for his employer's truck. While cranking his own Ford car it back fired, causing fracture of the wrist. It was held, injury arose out of and in the course of employment since the use of his own car was in a job he started to do for his employer, to the employer's advantage with no pecuniary gain for himself.

In *Van Gee* v. *Courts*, 169 N. E. 370 (N. Y. Ct. of App. 1929), the employee failed to appear at the employer's plant in time to load his truck, due to the fact that he overslept. Employer's son took employer's automobile and drove to truck driver's home at 2 a. m. and was driving back to the plant with the employee when the accident occurred in which both were killed. It was held that the injury arose out of and in the course of employment. See also *Foggs* case, 132 Atl. 129. *MacClelland* v. *Dodge Bros.*, Vol. 11, N. Y. Industrial Bulletin, November, 1931, page 12, 233 App. Div. 504.

Many similar cases exemplifying the exceptions to the general rule above stated will be found in the American Digest System, "Master and Servant" key number 375 (2) "Injuries received while going to and from work."

In the following case, *Rawson's* case (Maine 1928) 140 Atl. 365, the court discusses the exceptions to the general rule herein mentioned:

> "This general rule is subject to certain definite classes of exceptions. They are well set forth in *Whitney* v. *Hazard Lead Works, et al.*, 136 Atl. 105. Four of them may be noted: (1) where the employment requires the employees to travel on the highway; (2) where the employer contracts to, and does, furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of the fireman; (4) where the employee is using the highway in doing something incidental to his employment with the knowledge and approval of the employer."

The evidence in the present case shows clearly that Mr. Voehl was allowed overtime pay at the rate of $.75 per hour and mileage at the rate of $.05 per mile *from the moment he left his home until his return thereto* (R. 23, 24, 35, 49). This allowance was not made in going to and from work during his regular weekday service (R. 36, 49). If he deemed it necessary to go to the warehouse on Sunday he was not required to obtain special authority to do so, and when he made such a trip, if in connection with his work and in the interest of his employer, he would receive overtime pay and mileage for the use of his automobile (R. 70). On Sunday, April 6, 1930, the record clearly shows that Mr. Voehl left his home for his place of employment on a mission for his master. Under the rule expressed in the exceptions above, he was on a

"duty status" from the moment he left his home. His services on that day were in the nature of a special errand to his employer's premises to perform a particular and necessary duty required by the exigencies of his employment, and as a consequence of special conditions arising on the employer's premises due to an unusually large accumulation of debris, which he was required to remove and clean away prior to inspection on the next day.

It is particularly in point to note the agreement between Mr. Voehl and his employer with respect to overtime pay and mileage referred to herein, to the effect that if he had completed the service or gone to his employer's premises on the day of injury he would have been entitled to put in a slip for overtime pay and mileage (R. 25). The fact that the injury took place within a few minutes after leaving his home was the occasion for not putting in such a slip for reimbursement.

The evidence in this case clearly indicates that the employer considered Mr. Voehl at the time of his injury was acting within the scope of his authority and entirely within the discretionary powers vested in him by the employer (R. 25), and that the injuries were sustained under circumstances unmistakable, showing that they arose out of and in the course of his employment. The insurance carrier in this case did not put on a single witness before the deputy commissioner.

In this connection it is desired to cite the following case, decided by the Supreme Judicial Court of Maine October 1, 1925:

> "Who better than the employer would know whether an employee is 'doing his regular work' at the time when the accidental injury occurred? Since the employer admits, and the Chairman of the Industrial Accident Commission has found, no fraud appearing, that the petitioner received his injury in the course of his employment, we are not disposed to differ from that admission and finding. *Beers'* Case, 130 A. 350." See also *Jessup* v. *Wrigley*, 250 N. Y. 563.

3. The respondent raised the contention below that this injury is not compensable because it arose out of a "traffic hazard."

At one time in the early administration of compensation laws in the various States there was adopted in some of the States what was then known as the "commonalty doctrine" in which the rule was followed that injuries occurring on public highways while the employee was in the course of his employment did not "arise out of the employment." This doctrine lead to so many injustices, particularly where employees perform no service except upon the public highways, that it has been repudiated in practically every State in the United States and in England.

In the administration of the District of Columbia Workmen's Compensation Act, which Act is an adaptation to the District of Columbia of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, the decisions in the State of New York from which our present Act was largely adopted are of especial force and value. In applying the law therefore to the present case the petitioner has sought particularly to

ascertain the construction placed on similar phraseology in the Act applicable in the State of New York.

That the old "commonalty doctrine" does not obtain in New York State, can readily be observed in the cases cited, and by consideration of innumerable cases decided by the New York Court of Appeals in the last twelve years. It can be stated that injuries resulting from traffic hazards, occurring on public highways, to employees in the course of their employment likewise "arise out of the employment".

Thus in *Katz* v. *Kadans & Company,* 232 N. Y. 420; 134 N. E. 330, the New York Court of Appeals held that the workmen's compensation act protects an employee passing along the streets when on his master's business if the work involves perils of street, strange, unanticipated, and infrequent though they may be, and injuries therefrom "arise out of the employment". See also *Roberts* v. *J. F. Newcomb & Co.* (N. Y. C. A. 1923) 234 N. Y. 553; 138 N. E. 443.

The rule is stated in the English case of *Dennis* v. *White & Co.,* 1917 A. C. 479, as follows:

> "If a servant in the course of his master's business has to pass along the public street, whether it be on foot or on a bicycle or on an omnibus or car and he sustains an accident by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment. The frequency or infrequency of the occasion on which the risk is incurred has nothing to do with the question whether an accident resulting from that risk arose out of the employment."

This matter has been passed upon by the Court of Appeals of the District of Columbia, in the very recent case of *New Amsterdam Casualty Co. v. Hoage, Deputy Commissioner*, 62 Fed. (2d) —, in a compensation case in which that court affirmed the award of the deputy commissioner, involving an accident occurring on the public highways. Mr. Chief Justice Martin in an opinion rendered November 28, 1932, states:

> "In the early administration of compensation laws the rule was often adopted that injuries occurring on the public highways due to traffic hazards did not 'arise out of' the workman's employment. This rule was founded upon the theory that such hazards are common to the community at large and are not incident to particular employments, and it was held that the compensation acts were not designed to exempt the employee from such risks. This doctrine, however, has since been abandoned. It is now held by the greater weight of the authorities that if an employee in the course of his employment has to pass along the public streets and thereby sustains an accident by reason of the risks incident to the streets, the accident 'arises out of' as well as 'in the course of' his employment."

The Court of Appeals then cites *Schroeder & Daly Co.* v. *Industrial Commission of Wisconsin*, 169 Wisc. 567; *McCulloch* v. *Pittsburgh Plate Glass Co.*, 107 Conn. 164; *Hansen* v. *N. W. Fuel Co.*, 144 Minn. 105; *Porter Co.* v. *Industrial Commission*, 301 Ill. 76; *Morse* v. *Port Huron & D. R. Co.*, 251 Mich. 309; *Fiarenzo* v. *Richards & Co.*, 93 Conn. 581.

Conclusion.

In conclusion it is respectfully stated that the evidence presented before the deputy commissioner in the present case as reported in the transcript of testimony filed herein which has been made a part and parcel of the respondent's bill in Equity below, together with the compensation order complained of, shows unequivocally that Karl F. Voehl, the employee, when he received his injuries was engaged upon a mission for his employer on Sunday, April 6, 1930, in the nature of a special errand under general authority vested in him by his employer and under a general agreement with the employer with respect to overtime pay and mileage for the use of his own personal car, while engaged in this mission.

This proceeding was brought under Section 21(*b*) of the Longshoremen's Act as applied to the District of Columbia, upon an application for judicial review of the compensation order to determine whether it was "not in accordance with law". The insurance carrier in the lower court placed the whole case before the court upon his bill and the exhibits thereto annexed. The bill of complaint, with transcript of testimony and compensation order annexed, presented to the court the insurance carrier's case which made the bill subject to a motion to dismiss on the points involved; namely, whether there was any substantial evidence in that transcript of testimony, a part of the bill, to support the allegations of the bill or the findings of fact of the deputy commissioner, and such points of law as therein involved.

The question for the determination of this Honorable Court is whether there is any competent evidence to support the findings of fact of the deputy commissioner. Should the findings of fact of the deputy commissioner be found to be supported by the evidence then, under the ruling of this Honorable Court in *Crowell, Deputy Commissioner,* v. *Benson, supra,* and *L'Hote* v. *Crowell, Deputy Commissioner, supra,* they should be given the stamp of finality.

Your respondent respectfully contends that the Court of Appeals of the District of Columbia has made an independent inquiry into the facts concerning the *circumstances* of Mr. Voehl's trip on the day of his injury and has arrived at a *fact conclusion* that Mr. Voehl was not proceeding about his master's business and that therefore the injury did not arise out of and in the course of employment. The natural inference is that the court below has reweighed the evidence in this case. The conclusion which it has reached on the facts is not supported by the record.

At this juncture it is desired to respectfully direct the Court's attention to Section 20 of the Longshoremen's Act which provides in part as follows:

> "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed in the absence of substantial evidence to the contrary— (*a*) That the claim comes within the provisions of this Act."

The insurance carrier, appellant below, not only failed to offer any evidence tending to rebut the claim of Mr. Voehl but fell entirely short of offering any "substantial" evidence to the contrary.

Your petitioner, therefore, respectfully submits that the Court of Appeals of the District of Columbia in the above entitled cause was in error and that its decision be reversed and the original decree entered by the Supreme Court of the District of Columbia be affirmed with costs in this behalf incurred.

Respectfully submitted,

ISRAEL J. MENDELSON,
Counsel for Petitioner.

(2783)

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 315

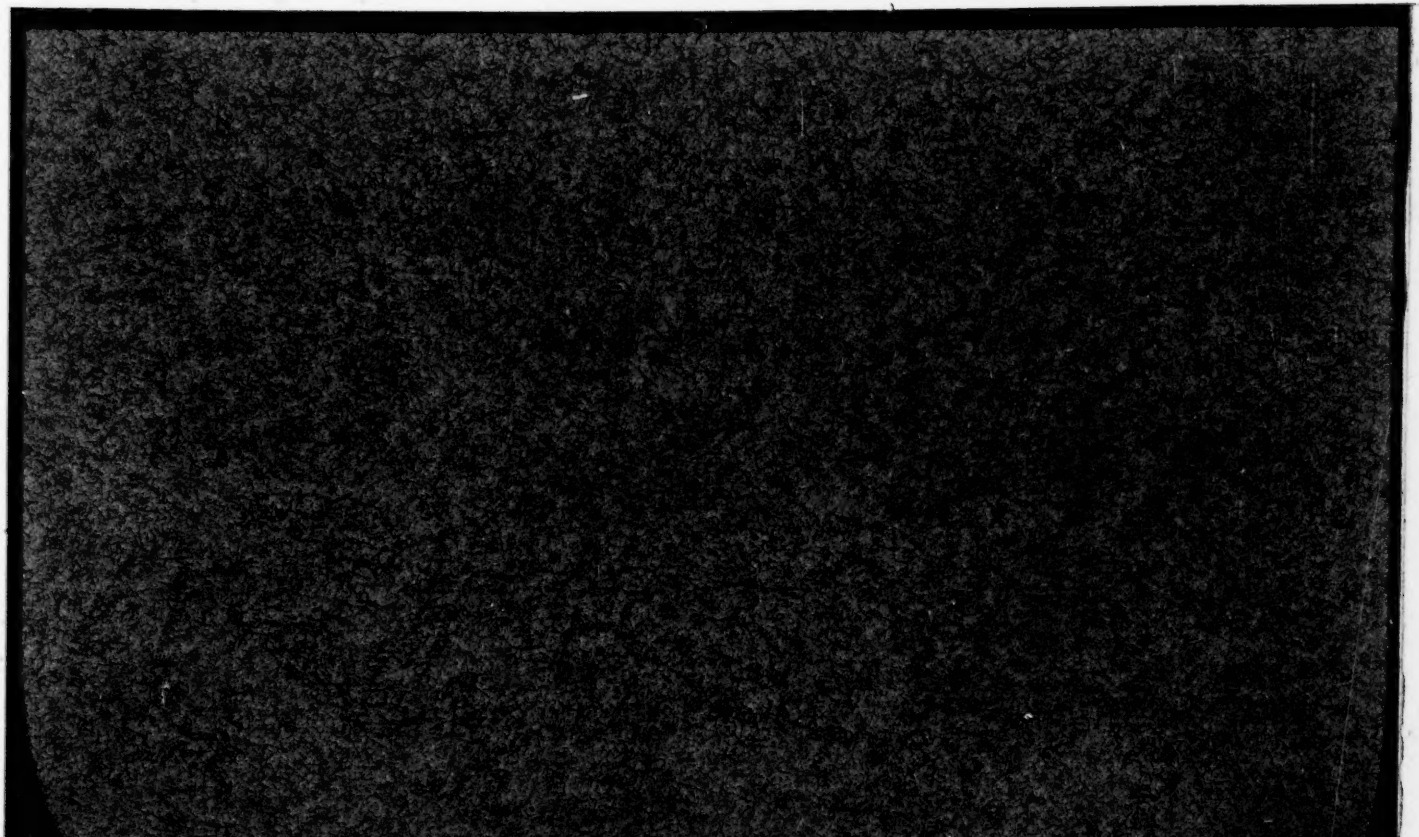
KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
Attorneys for Respondent.



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IN THE

SUPREME COURT OF THE UNITED STATES.

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No. 315

KARL F. VOEHL, PETITIONER,

vs.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Now comes the respondent, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, and upon the grounds hereinafter set forth, opposes petitioner's application for writ of certiorari to review the decision of the Court of Appeals of the District of Columbia in the above case.

SHORT STATEMENT.

Karl F. Voehl, petitioner, employed by the National Electrical Supply Company to supervise the handling

of refrigerators *at* his employer's warehouse, was injured on Sunday, April 6, 1930, at 8.30 a. m., while on his way from his home in Maryland to the warehouse in the District of Columbia. He was *driving his own automobile,* which overturned, as a result of a defect in the steering gear, *at a point several miles from the warehouse* (R. 2, 18, 69).

Under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stats. 1424), which was made applicable to employments in the District of Columbia by Act of Congress approved May 17, 1928 (45 Stats. 600), Voehl applied to Deputy Commissioner Hoage for and was awarded compensation against respondent, the Insurance Company with which his employer carried compensation insurance (R. 52-55).

Pursuant to Section 21 of the Compensation Act, respondent filed a bill in equity in the Supreme Court of the District of Columbia to enjoin the enforcement of the award, on the ground that the award was "not in accordance with law" in that the injury did not arise out of or in the course of Voehl's employment (R. 1-7). The entire testimony taken before the Deputy Commissioner was attached to the bill as an exhibit (R. 9-52).

Deputy Commissioner Hoage filed a motion to dismiss the bill (R. 56-57) and such motion was granted by the Supreme Court of the District of Columbia (R. 58), but the decree dismissing the bill was reversed by the Court of Appeals (R. 74) for the reasons stated in its opinion (R. 69-73), 58 Fed. (2d) 1074.

Voehl now applies to this Court for a writ of certiorari to review the decision of the Court of Appeals.

ARGUMENT.

Petitioner does not base his petition upon any of the grounds set forth in Rule 38, Section 5 (*c*), of this Court, except the last one, that is, he claims that the Court of Appeals has not given proper effect to applicable decisions of this Court. Using his own words, petitioner asserts that the Court of Appeals "erred in refusing to give conclusive and final effect to the findings of fact of the Deputy Commissioner" and thus failed to follow the decisions of this Court in *Crowell* v. *Benson*, 285 U. S. 22, and *L'Hote* v. *Crowell*, 286 U. S. 528 (Petitioner's Brief, pages 4-5).

1. Facts undisputed. Court below disagreed only with the Deputy Commissioner's conclusions of law.

Under Equity Rule 28 of the Supreme Court of the District of Columbia, the Deputy Commissioner's motion to dismiss the bill was equivalent to a demurrer, which admitted that *all facts* alleged in the bill were true. The facts relating to the accident and injuries being, therefore, undisputed, there was no necessity for the Court of Appeals to "delve" into the evidence to "reweigh" those facts and the Court did not do so. Upon the undisputed facts, however, the Court below disagreed with the Deputy Commissioner's *conclusion of law* that the injury arose out of and in the course of petitioner's employment.

2. Only facts reviewed by Court below were "jurisdictional," following Crowell v. Benson, 285 U. S. 22.

At the oral argument of this case in the Court of Appeals on April 7, 1932, the decision which had been rendered by this Court on February 23, 1932, in the case of *Crowell* v. *Benson*, 285 U. S. 22, was fully discussed. The Court of Appeals understood that this Court had ruled that the Compensation Act "contemplates that as to questions of fact *with respect to injuries to employees within the purview of the Act*, the findings of the Deputy Commissioner, supported by evidence and *within the scope of his authority*, shall be final," but, in *Crowell* v. *Benson*, this Court also held that "rulings of the Deputy Commissioner upon questions of law are without finality" and "the Congress has not expressly provided that the determinations by the Deputy Commissioner of the *fundamental or jurisdictional facts* as to the locality of the injury and the existence of the relation of master and servant shall be final."

Whether Voehl was on duty; whether the injuries arose out of and in the course of his employment, and "whether the relation of employment existed" at the time of the accident, were "fundamental," "basic" or "jurisdictional" questions, which the Court of Appeals could and did properly review. The Deputy Commissioner was not clothed with unrestricted power to rule, with finality, upon the question as to whether or not he had jurisdiction of the case. If the injuries did not arise out of and in the course of Voehl's employment, the Deputy Commissioner was without juris-

diction and the Court was vested with complete power to correct his erroneous *conclusion* to the contrary.

The short *per curiam* opinion in *L'Hote* v. *Crowell*, 286 U. S. 528, upon which petitioner relies, follows and is entirely consistent with the ruling in *Crowell* v. *Benson*, 285 U. S. 22, upon which respondent relies.

3. Court of Appeals correctly held, upon undisputed facts, that injury did not arise out of and in course of employment.

It seems unnecessary here to examine the evidence in detail. The main facts were undisputed that the accident occurred while plaintiff was on his way from his home to his employer's warehouse, a fixed place of employment. The Court, therefore, correctly applied the settled *general rule* that, in going to and from work, an employee does not come within the purview of compensation statutes.

The Court below, in its opinion, further demonstrated that none of the *exceptions* to the general rule apply to this case. Voehl was not seeking ingress to his employer's premises, in fact he was not in close proximity thereto, but was *several miles distant therefrom;* the transportation was not furnished by his employer, as he was driving *his own automobile* over which the employer had no control; he was not engaged in a "travelling employment" at the time of the accident, even though it was his duty, at other times, to make special trips to the homes of customers for the purpose of servicing refrigerators.

The *main object* of Voehl's trip was to obtain a load of ashes for his own purposes and, immediately after

the accident, the failure to get the ashes "was the only thing that bothered him" (R. 14). It was not a part of Voehl's duty to remove the ashes (R. 29, 40).

4. Injury resulted from "traffic hazard."

The Court below was clearly justified in agreeing with the view *first* expressed by the Deputy Commissioner that "the hazard to which the claimant was subjected at the time he was injured was a *traffic hazard* and not one incidental to his occupation" (R. 8).

Where the employee "meets with an accident before coming to the employer's premises or his place of work, that is not a risk of his occupation, but of life generally" (*De Voe* v. *New York State Railways*, 218 N. Y. 318).

CONCLUSION.

It is, therefore, respectfully submitted that the decision of the Court of Appeals is in accord with the opinion rendered by this Court in *Crowell* v. *Benson*, 285 U. S. 22; that the *conclusion* or determination of the "jurisdictional question" by the Court of Appeals, that petitioner's injury did not arise out of and in the course of his employment, was fully justified by the undisputed facts, and the petition for writ of certiorari should, therefore, be denied.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 315

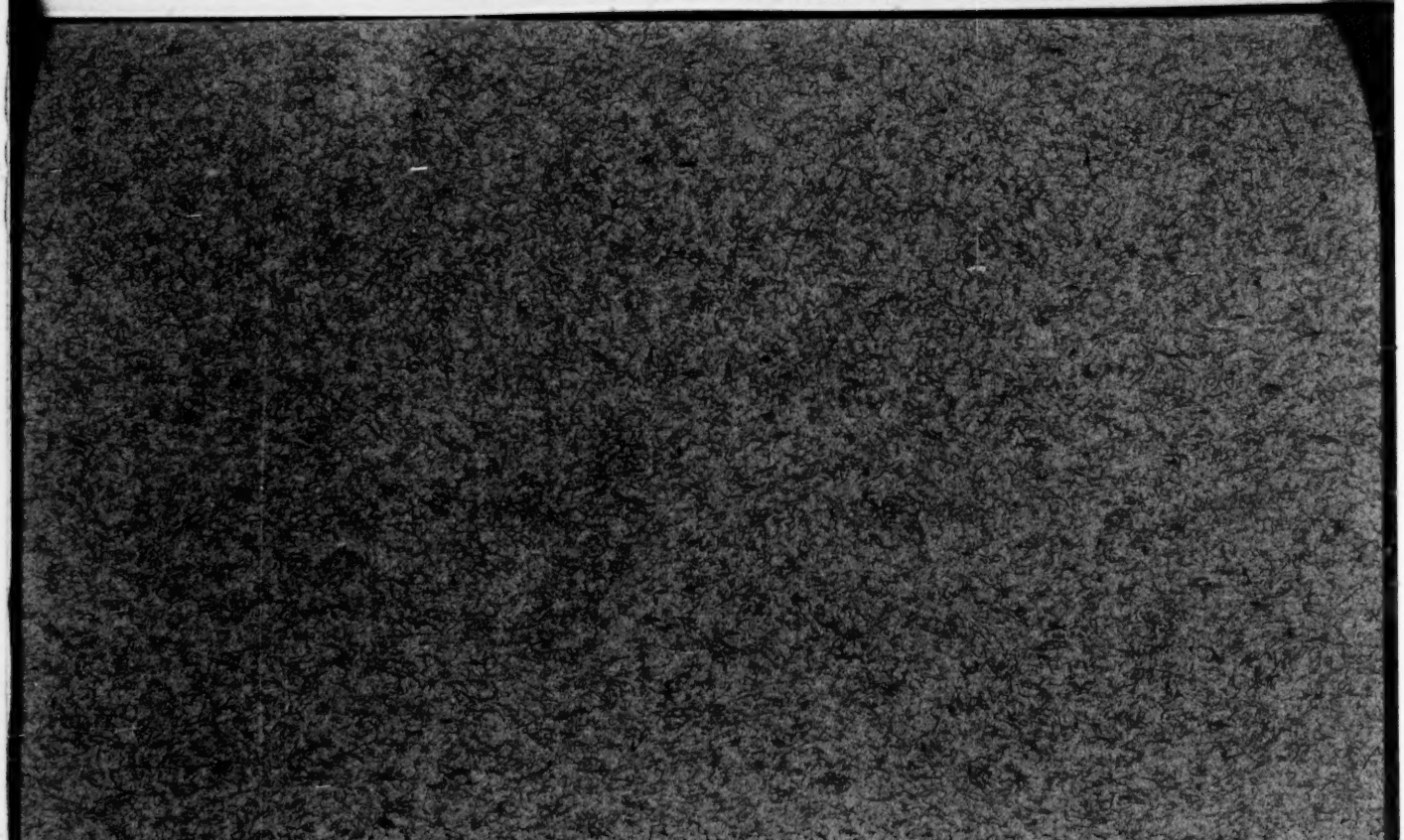
KARL F. VOEHL, PETITIONER,

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BRIEF FOR RESPONDENT.

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Attorneys for Respondent.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 315

KARL F. VOEHL, PETITIONER,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT.

BRIEF FOR RESPONDENT.

Short Statement.

Pursuant to Section 21 (*b*) of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stats. 1424), which was made applicable to certain employments in the District of Columbia by Act of Congress approved May 17, 1928 (45 Stats. 600), hereinafter described as the "Compensation Act," the respondent, Indemnity Insurance Company of North America, with which the National

Electrical Supply Company carried its compensation insurance, filed a bill in equity to enjoin the enforcement of an award made by Deputy Commissioner Hoage in favor of Karl F. Voehl, petitioner, who was an employee of the Supply Company (R. 1-7). A transcript of the testimony taken before the Deputy Commissioner was attached as an exhibit to the bill (R. 9-52).

It appears from the allegations of the bill and from the exhibit that Voehl, employed by the Supply Company to supervise the handling of refrigerators at its warehouse, was injured on Sunday, April 6, 1930, at 8:30 a. m., while on his way from his home in Maryland to his employer's warehouse in the District of Columbia. He was driving *his own automobile,* which overturned as a result of a defect in the steering gear, at 52nd Street and Central Avenue N. E., in the District of Columbia, *several miles from his place of employment,* 1328 New York Avenue N. W. (R. 2, 18).

The main object of the trip was to get a load of ashes to dump in a mudhole near Voehl's home (R. 37-38). Voehl stated that he also intended to clean up some trash at the warehouse (R. 50), although it was the duty of his subordinates to do such work (R. 48-49).

The bill concluded with an allegation that Voehl's injury did not arise out of or in the course of his employment; that his claim did not come within the provisions of the Compensation Act; that the findings of the Deputy Commissioner were not supported by,

but were directly contrary to the evidence, and the Insurance Company, therefore, prayed that the Court enjoin the enforcement of the Deputy Commissioner's award, because such award was "not in accordance with law" (R. 7).

The Deputy Commissioner filed a motion to dismiss the bill (R. 56-57) and the motion was granted by the Supreme Court of the District of Columbia (R. 58), but the decree of that Court was reversed by the Court of Appeals, which held that "Voehl at the time and place of the injury was not performing any duty in the course of his employment" (R. 72), as more fully set forth in its opinion (R. 69-73), 58 Fed. (2d) 1074-1076.

This Court has granted a writ of certiorari to review the decision of the Court of Appeals (R. 77).

STATEMENT OF FACTS.

At the hearing before the Deputy Commissioner, besides testimony of a physician as to the injuries, only two witnesses testified, namely, *Hugh L. Finnegan,* Voehl's brother-in-law, who accompanied him in the automobile when the accident occurred, and *C. Leslie McCrea,* Voehl's superior officer, who testified principally concerning the nature of Voehl's duties. In lieu of oral testimony, a written statement signed by Voehl was admitted in evidence by consent (R. 48-50).

Circumstances Surrounding Accident.

Finnegan, who lived half a mile from Voehl's home in Seat Pleasant, Maryland, testified that he was asked

by Voehl to accompany him to the warehouse on the Sunday in question *to get a load of ashes,* which they planned to dump in a mud hole in the road near by (R. 37), Voehl saying that he needed help to lift the big cans of ashes but did not need help in cleaning the warehouse (R. 3, 15). They went to Voehl's home to breakfast, then started in Voehl's automobile for the warehouse and the automobile overturned while Voehl was driving, as a result of a defect in the steering gear, at 52nd Street and Central Avenue N. E. (R. 4, 18).

Purpose of Trip.

Finnegan's testimony indicated that the *main object of the trip* was to obtain a load of ashes for Voehl's own purposes (R. 14), and McCrea admitted that "the removal of ashes was not under Mr. Voehl's jurisdiction" (R. 40) and "not even incidental to the operation of the refrigeration department" (R. 30), but according to Voehl's statement, he also intended, when he reached the warehouse, to clean up some trash, which had accumulated there (R. 50), although he should have had his subordinates do such work (R. 49). McCrea testified that Voehl "always insisted on doing too damned much work himself" (R. 32).

Voehl's Employment and Duties.

McCrea testified that Voehl was employed under him as "Head of the Products Division" (R. 4, 21). Voehl's duties were two-fold: (1) as *manager of the warehouse,* he supervised unloading and placing refrigerators *in* the warehouse, and delivering and installing them in

customers' homes, and it was his duty to see that the buildings were kept in order and that fire rules were obeyed (R. 4, 22, 48); and (2) as *service manager,* he had charge of the Company's 24-hour-a-day service on refrigerators in customers' homes (R. 4, 22, 48). Voehl had eight men employed under him at the warehouse in addition to several service men to take care of calls (R. 22, 48-49).

Voehl's regular hours were from 7.30 a. m. to 5.30 p. m., but to enable him to take care of service calls, the Company had a telephone installed in his home and when a call came in from a customer after regular store hours, it was relayed to Voehl's home, whereupon Voehl would take care of the call personally or instruct one of the service men to do so (R. 4, 22).

Allowance for Use of Automobile and Overtime Pay.

On service calls outside of regular hours, if Voehl used his own automobile, he was allowed overtime pay and five cents per mile from the time he left his home until his return (R. 4, 23).

Voehl received no allowance for use of his automobile going to and from work during the week from Monday to Saturday (R. 30). Voehl stated that he went to the warehouse on Sunday when he considered it necessary and was not required to obtain special authority to do so (R. 49). He claimed that if he made such a trip on Sunday, he would receive his mileage and overtime pay (R. 49).

At the hearing, McCrea was asked to furnish any record he had of mileage and overtime actually paid to

Voehl for work on Sundays and later wrote to the Commissioner that the records for December, 1929, and prior thereto, had been destroyed, and the only record he could find of Voehl being paid for Sunday work was one instance on February 2, 1930, when Voehl came into Washington for three purposes, (1) to remove a refrigerator exhibit from Washington Auditorium, (2) to straighten up the warehouse, and (3) to take an inventory of stock (R. 51).

The evidence will be discussed in more detail as to certain points in the course of the argument below.

Statute Involved.

For convenient reference, two pertinent extracts from the Compensation Act (44 Stats. L. 1424, 1425, 1436), are quoted, as follows:

Sec. 2—

> "(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

* * * * * * *

Sec. 21—

> "(*b*) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceed-

ings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States."

QUESTION PRESENTED.

In view of the decision of this Court in *Crowell* v. *Benson*, 285 U. S. 22, did the Court of Appeals have power and was the duty imposed upon it:

1. To review the evidence relating to the *basic or jurisdictional fact of employment*, that is, the evidence upon which the Deputy Commissioner based his *conclusion of law* that the injury arose out of and in the course of Voehl's employment, and

2. To sustain the position taken by respondent, upon that evidence, that Voehl's injury did not arise out of and in the course of his employment; that the Deputy Commissioner was wholly lacking in jurisdiction; that his award was "not in accordance with law" and enforcement thereof should be enjoined?

ARGUMENT.

1. Court of Appeals had authority to review evidence relating to jurisdictional fact of employment, upon which Deputy Commissioner based his conclusion of law that Voehl's injury arose out of his employment.

This first point appears to be fully covered by the recent exhaustive review of this same Compensation Act by this Court in the case of *Crowell v. Benson,* 285 U. S. 22. There the Deputy Commissioner made an award in favor of Knudsen, who claimed that he was an employee of Benson. Suit being brought to enjoin the enforcement of the award on the ground that Knudsen was not *at the time of his injury* an employee of Benson and his claim was not within the jurisdiction of the Deputy Commissioner. The Federal District Judge denied a motion to dismiss the bill, granted a hearing *de novo,* decided that Knudsen was not in the employ of Benson and restrained the enforcement of the award. This decree was affirmed by the Circuit Court of Appeals and by the Supreme Court of the United States.

In the opinion of this Court, Chief Justice Hughes stated:

> "There can be no doubt that the Act contemplates that as to questions of fact, arising *with respect to injuries to employees within the purview of the Act,* the findings of the Deputy Commissioner, supported by evidence and *within the scope of his authority,* shall be final." (Italics supplied.)

But the Chief Justice also clearly explained the distinction between such questions of fact as to the "circumstances, nature, extent and consequences of the injuries," and similar matters, which are within the scope of the Deputy Commissioner's administrative authority, and the *basic or jurisdictional facts* as to whether the injury arose out of and in the course of the employment, saying:

> "Rulings of the Deputy Commissioner upon *questions of law are without finality.*"
>
> * * * * * * *
>
> "The Congress has not expressly provided that the determinations by the Deputy Commissioner of the *fundamental or jurisdictional facts* as to the locality of the injury and the existence of the relation of master and servant shall be final."
>
> * * * * * * *
>
> "If the court finds that the *facts* existed which gave the Deputy Commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these *fundamental questions* are concerned; if, on the contrary, the court is satisfied that the Deputy Commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose." (Italics supplied.)

Under Equity Rule 28 of the Supreme Court of the District of Columbia, the Deputy Commissioner's motion to dismiss the bill was equivalent to a demurrer, which admitted that *all facts* alleged in the bill were

true. If the allegation that Voehl's injury did not arise out of his employment was an allegation of *fact*, it was admitted by the motion to dismiss. If that allegation was a *conclusion of law*, such conclusion could be reviewed and reversed in an appropriate Court proceeding.

> "The legal effect of evidence is a question of law."
>
> *I. C. C.* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91.

2. Assuming that the Court of Appeals had power to review the evidence on the jurisdictional point, it was right in sustaining the position taken by respondent that Voehl's injury did not arise out of his employment and the Deputy Commissioner had no jurisdiction over the case.

This second proposition leads to a consideration of the *general rule* applicable to such cases.

General Rule.

Employee Going to and from Work Not Covered by Compensation Law.

Counsel for petitioner, in his brief, admits and quotes authorities holding that employees injured while going to or from work, are not covered by compensation laws, as a *general rule*.

This general rule has been well expressed, as follows:

> "It is a well-settled general rule that an injury suffered by an employee in going to or

returning from the employer's premises where the work of his employment is carried on, except in special instances not here involved, does not arise out of his employment so as to entitle him to compensation."

Podgorski v. *Kerwin*, 144 Minn. 313; 175 N. W. 694;
Nesbitt v. *Twin City Forge Co.*, 145 Minn. 286; 177 N. W. 131.

This general rule, with its exceptions, has also been well stated, in Special Bulletin No. 118, issued under date of June, 1923, by the Department of Labor of New York State, reviewing Court decisions construing the New York Compensation Law, which is similar to that involved here, as follows:

"The employee who ordinarily performs no duties for his employer outside the employer's plant or premises and who comes and goes morning and evening between his home and his work-place is in different status relative to the hazards of his traveling from the employee who goes forth from his work-place upon some casual errand for his employer or who travels continuously in his employer's interest. Injury occurring between the employee's home and the employer's premises is not incidental to the employment and, therefore, not compensable, if such injury has no other connection with the employment than the mere coming and going. Special circumstance may, however, link such coming and going up with the employment and so make injury in the course of it compensable; such as, *carrying money for the*

employer, ingress and egress to and from the work-place, or traveling in a vehicle provided by the employer."

Exceptions to General Rule Do Not Apply.

As above indicated, there are several exceptions to the general rule and counsel for petitioner emphasized such exceptions in the court below, but failed to point out under which one this case should, in his opinion, be classified. A consideration of these exceptions will quickly demonstrate that the **present case does not come within any of them, but is governed by the general rule.**

First Exception—Voehl Not Close to Employer's Premises.

An employee may be protected by compensation insurance while he is seeking ingress to or egress from his employer's premises, and while he is *immediately adjacent* thereto, even though he is injured a few minutes before his work is to begin.

Cudahy Packing Co. v. *Parramore,* 263 U. S. 418;

Bountiful Brick Co. v. *Giles,* 276 U. S. 154.

The present case does not come within this exception, because here the accident occurred *several miles* from the place of employment.

In the English case of *Gilmour* v. *Dorman,* 105 L. T. N. S. 54, the Court referred to an accident which occurred some distance from the place of employment, as follows:

"I cannot regard the case as in any way different from the case where a workman slips on the ice on a public road, a quarter of a mile from his employer's work. It has been repeatedly held that a man is not entitled to the protection of the act when on his way from his home to his work. There may be some difficulty in ascertaining precisely when a workman's employment begins. Generally speaking, the factory, gate or yard indicates the boundary. Sometimes there may be a sort of excrescence, but I am not prepared to hold that an accident which occurred in a field some quarter of a mile distant, separated from the premises where the workman is to work, by land over which he has no right of access, can be deemed to have arisen 'in the couse of' his employment."

Second Exception—Transportation Not Furnished by Employer.

It is generally held that where transportation is furnished by an employer as an incident of the employment, an injury suffered by the employee going or coming *in the vehicle so furnished by the employer and under his control,* arises out of and is within the course of the employment, within the meaning of Workmen's Compensation Acts. Many cases supporting this exception will be found in the following notes:

10 A. L. R. 169;
21 A. L. R. 1223;
62 A. L. R. 1438.

Such cases arise where an employer, operating a factory, sends a bus to a certain meeting place to pick

up employees and bring them to the factory, or where a railroad company furnishes a special work train to take employees to work at some distant point. In such cases the bus and its driver, the train and its engineer are under the control of the employer.

In the present case, assuming that Voehl would have been reimbursed or paid five cents per mile for the use of *his* automobile, the vehicle was not furnished by the employer and was not in any way under the employer's control. It is conceded by petitioner in his brief that if the accident had occurred on a week day, Voehl would not have been protected, and so far as this exception to the general rule is concerned, it is difficult to see how the payment of five cents per mile to him on Sundays would bring him within the "course of his employment" any more than reimbursing him for his car fare if he had used a street car or some public conveyance, which was in no way under the employer's control.

This exception does not apply to a case where the employee is using his own automobile, even though he may be paid by his employer for its use.

The case of *Artmeyer* v. *Mason,* 220 App. Div. N. Y. 787, is exactly in point. There an expert die and tool maker, superintendent of his employer's plant, lived in Buffalo and worked in East Aurora, driving to and fro *in his own automobile.* He was struck and killed by a railroad train at a highway crossing while on his way to his place of employment. His employer had allowed him an hour in the morning and half an hour in the evening for traveling, the hours at the plant being from 7 a. m. until 6 p. m. and *allowed or paid*

him ten dollars a week for the use of his automobile. The referee awarded compensation to his widow, but the Industrial Board rescinded the award and the Appellate Division of the New York Supreme Court unanimously affirmed the Board's action, thereby holding that decedent's death did not arise out of his employment.

The reasoning of the Court in *Grathwohl v. Nassau Point Club Properties,* 216 App. Div. N. Y. 107, affirmed 243 N. Y. Rep. 567, is also most interesting. There the employer owned a real estate development and the claimant was in charge thereof, with several men employed under him. Claimant was required to visit the property every day and *used his own Ford automobile,* supplying the gas and oil, while going from his home to the property. This was taken into consideration in fixing the amount of his wages. While cranking his car preparatory to driving to work, he was injured. In the opinion, the Court said:

> "If the car had been *owned by his employer,* and the claimant had been required to store it nights in his employer's garage at Peconic, the claimant would have been in the course of his employment while cranking it at such garage to take it to his employer's premises. Taking his employer's car to his employer's garage at Peconic would have been the business of his employer. *Taking his own car to his own garage* at the same place was an entirely different matter. It was so taken by him on the night prior to the accident that he might eat, sleep and rest at home, or otherwise divert himself. That was *his own personal business.* Be-

> cause he had thus used it for personal business it was necessary in the morning to crank it and drive it to his employer's premises. That was also his personal business. If the claimant had been injured while *walking* to or from his employer's premises, it is certain that he would not then have been in the course of his employment. It can make no difference that in the instance under consideration he was about to journey to his master's premises *upon fast revolving wheels rather than upon his feet.* It seems to me that the claimant was not in the course of his employment when he was accidentally injured." (Italics supplied.)

The above language is applicable to the present case where Voehl was using his own car, for his own convenience, to travel back and forth between his home and his place of employment. If he had been walking and injured on the street at a point even several blocks from the warehouse, he would have been in no position to claim compensation. The fact that he was on "fast revolving wheels," instead of his feet, can make no difference, especially when the "wheels" belonged to him and not to his employer.

Third Exception—Voehl not "Travelling Employee" nor on Special Errand.

Another exception to the general rule occurs when an employee is sent on a service call to the house of a customer, or where the nature of the business requires the employee to travel. Chauffeurs sent on a special errand, or travelling salesmen going from customer to

customer have been held to be acting within the scope of their employments.

Cases involving such "travelling employments" are collected in a note in 36 A. L. R. 474.

Voehl, however, was not engaged in any such *travelling employment at the time of his injury.*

As *service manager,* Voehl was subject to call by telephone to make emergency repairs to a refrigerator at the home of a customer. In that capacity, he was a *travelling employee.* He was not, however, engaged in any such duty *when he was injured.* The fact that *service men* were paid overtime and mileage, while on special errands (making service calls), from the time they left their homes until they returned, is not pertinent to the issue in this case.

Voehl was also *manager of the warehouse* and in that capacity was a *"stationary" employee,* having a fixed place of employment, namely, his employer's warehouse. At the time of the injury, Voehl was in the category of *an employee having a fixed place of employment,* to whom the general rule applied, that is, he was not protected by compensation insurance while going from his home to such fixed place of employment. He had no duty to perform for his employer while *en route* and the vehicle in which he was riding belonged to him and was entirely under his control. The employer had no opportunity to protect itself by having the automobile inspected or by selecting an experienced driver to operate it.

Various Bulletins issued by the Department of Labor of New York State classify accidents arising

under the Compensation Laws as "On Premises" and "Off Premises" accidents. Employees having a fixed place of employment, such as a factory or warehouse, are covered by the Compensation Law only when they are *on the premises* of their employer, or in *immediate proximity* thereto seeking egress or ingress, or being transported to or from work in a vehicle which is under the employers' control. Otherwise only employees whose duties require them to travel are covered when *off the premises* of their employer.

Method of Paying Wages Does Not Give Rise to an Exception to General Rule.

Petitioner contends that if Voehl had completed his trip he would have been paid overtime wages from the time he left his home and that he was, therefore, covered by insurance from the moment he left his home.

Respondent does not concede that this is an exception to the general rule. The method by which an employer pays his employee his wages is not the determining factor upon the question whether the employee is acting within the scope of his employment at a certain time. This is emphasized in the following cases reviewed above:

Stimal v. *Jewett & Co.*, 198 App. Div. N. Y. 427;
Artmeyer v. *Mason*, 220 App. Div. N. Y. 787.

If, instead of paying his employee by the month or by the week, an employer should say to him "I am paying you 20 cents per hour, or $4.80 per day of 24 hours,

because I expect you to be subject to call at any time." In such a situation, could it be said that the employee could recover if he fell out of bed in the middle of the night, merely because the accident occurred *during the hours for which he was paid?* Would an employee, so paid, be covered by the Compensation Act every minute of every day from the moment he steps out of the front door of his home on his way to his place of employment?

The liability of the insurance carrier cannot be so extended by an employer adopting such method of paying wages.

An Employee is Not Protected by Compensation Act Unless the Injury Arose Out of AND in the Course of the Employment.

The phrase "arising out of *and* in the course of employment" is in the conjunctive. The terms "out of" and "in the course of" are not synonymous, and if either of these elements is missing, there can be no recovery. The words "out of" refer to the origin or cause of the accident, and the words "in the course of" to the time, place, and circumstances under which it occurred.

L. R. A., 1916-A, p. 232.

Chief Justice Rugg, in a well considered opinion in *McNicol's* Case, 215 Mass. 497, said:

> "In order that compensation may be due the injury must both arise out of and also be received in the course of employment. Neither alone is enough."

* * * * * * *

> "It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a *causal connection* between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The *causative danger must be peculiar to the work, and not common to the neighborhood.* It must be incidental to the character of the business, and not independent of the relation of master and servant."

As Voehl was not performing any duties for his employer at the time and place of the accident, his injury did not occur "in the course" of his employment. As the *cause* of the accident was a cause over which the employer had no control and which was in no way connected with any of Voehl's duties, the injury did not "arise out of" the employment.

Voehl's Injury was Caused by Ordinary Traffic Hazard.

When the claim was first presented to him, the Deputy Commissioner made a careful and correct analysis of the case, as set forth in a letter written by him under date of July 2, 1930, (R. 8). In that letter, he stated in substance that, upon the evidence then presented to him (prior to the hearing), it appeared that (1) Voehl was injured while travelling from his home to his employer's place of business; (2) it was presumed that he reported to that place daily, *using his own car;* (3) he was paid mileage for the use of his car on special errands, but he was not shown to have been on a special errand *for his employer* at the time of his injury; (4) it was not shown that the employer provided the means of transportation, and (5) "the hazard to which the claimant was subjected at the time he was injured was a *traffic hazard* and *not* one incidental to his occupation" (R. 8).

"If these facts are correctly stated, it would not seem that the injury arose out of or occurred in the course of employment. If, however, there are other facts which would alter the status of the case, they should be submitted for further consideration by this office" (R. 8-9).

The evidence subsequently offered at the hearing on December 11, 1930, did not alter the status of the case and the Deputy Commissioner's *first conclusion,* above set forth, is fully supported by the entire evidence.

> "The employee is not insured generally against accident while working for the street

> railway corporation. At home or on the street he may meet with accident not arising out of or in the course of his employment. The act does not cover such cases. The employee gets up in the morning, dresses himself, and goes to work, because of his employment; yet if he meets with an accident *before coming to the employer's premises,* or his place of work, *that is not a risk of his occupation, but of life generally.''*
>
> *De Voe* v. *New York State Railways,* 218 N. Y. 318.

Similarly, in the case of *New Amsterdam Casualty Co.* v. *Hoage,* 60 App. D. C. 40; 46 Fed. (2d) 837, the decedent lost his life as the result of being struck by a street car, a *traffic hazard* in no way connected with his employment, and the Court of Appeals promptly held that the award made by the Deputy Commissioner should be set aside.

Petitioner, in his brief, calls attention to a second case having the same title, *New Amsterdam Casualty Company* v. *Hoage,* decided November 28, 1932, and not yet reported, in which the Court of Appeals of the District of Columbia said:

> "It is now held by the greater weight of the authorities that if an employee *in the course of his employment has to pass along the public streets* and thereby sustains an accident by reason of the risks incident to the streets, the accident 'arises out of' as well as 'in the course of' his employment." (Italics supplied.)

The phrase italicized above shows that the Court was extremely careful to limit the rule to cases where the "*employee in the course of his employment has to*

pass along the public streets," referring to so-called *travelling employees,* such as chauffeurs, bank runners, travelling salesmen, hereinbefore mentioned, the nature of whose employment requires them to pass along the public streets. In the case just cited, the injured employee was

> "a solicitor for a newspaper and *his duties required him to go from place to place within the city.* This implied that his travels might properly be made on foot and that he might traverse the sidewalks and the streets of the city *in the course of his employment."* (Quoting from unreported opinion, italics supplied.)

The Court then reviewed the cases of *Schroeder & Daly Co.* v. *Ind. Com. of Wisconsin,* 169 Wis. 567, in which the injured was a *salesman* who was required to go from place to place in a city; *McCulloch* v. *Pittsburgh Plate Glass Co.,* 107 Conn. 164, in which a *travelling salesman* was injured on a street, and *Mausert* v. *Albany Builders' Supply Co.,* 250 N. Y. 21, where a *teamster,* while driving his horses on a street, fell from his seat and was killed. All of these were *travelling employments.* Voehl, however, having a fixed place of employment at the warehouse, was not required to pass along the public streets *in the course of his employment.* According to petitioner's contention, Voehl intended to clean up the warehouse, but that duty could be performed only *at* the warehouse.

Main Object of the Trip.

Finnegan's testimony shows that the main object of Voehl's trip was to get a load of ashes for his own pur-

poses, to dump in a mud hole near his home (R. 14, 37), the removal of the ashes being no part of his duty to his employer (R. 30, 40). While on the first aid table immediately after the accident, Voehl was worrying about the ashes, "that was the only thing that bothered him" (R. 14). Voehl claimed that he also intended to clean up some trash that had accumulated in the warehouse, but that was not the main object of the trip.

The situation is similar to that involved in the case of *Marks* v. *Gray,* 251 N. Y. 90, where Marks was a helper in the service of a plumber, and his wife went to a nearby town to visit upon the understanding that Marks would call for her at the end of his day's work. His employer, hearing of the proposed journey, asked him to take his tools and fix some faucets in a dwelling in the town where his wife was visiting. While using *his own or his father's car* on the trip, he was injured in a wreck. The Court held that Mark's *main object in making the trip* was to call for his wife; that his employment did not cause him to make the journey or expose him to its risks and his injury did not arise out of his employment.

Burden of Proof.

At the end of his brief, petitioner refers to Section 20 of the Compensation Act providing:

> "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—(*a*) that the claim comes within the provisions of this Act."

Such presumption, however, is not "a substitute for facts" or a "substitute for proof." The burden is always upon the claimant to produce substantial evidence to prove that the injury arose out of and in the course of his employment.

Collins v. *Brooklyn Union Gas Co.*, 171 App. Div. N. Y. 381;
Eldridge v. *Endicott*, 228 N. Y. 21.

Opinion of Court of Appeals.

At the oral argument of this case in the Court of Appeals on April 7, 1932 (R. 69), the opinion theretofore rendered by this Court on February 23, 1932, in the case of *Crowell* v. *Benson*, 285 U. S. 22, was fully discussed. The Court of Appeals understood that, under the decision in *Crowell* v. *Benson*, it not only had the right, power and authority, but was under a positive obligation and duty to review the evidence relating to the *basic, fundamental, jurisdictional fact* as to whether the relation of master and servant existed at the time of Voehl's injury.

After carefully reviewing such evidence, the Court of Appeals found that Voehl

> "Was on the way from his home to the warehouse of his employer to get a load of ashes which they planned to dump in a mudhole in the road near Voehl's residence. The evidence discloses *beyond dispute* that the *main object* of the trip was to obtain the load of ashes" (R. 70). (Italics supplied.)

The Court of Appeals approved the *general rule* that an injury suffered by an employee going to and from his employer's premises, where the work of his employment is carried on, does not arise out of his employment so as to entitle him to compensation (R. 71).

The Court then discussed the exceptions to the general rule and held that the instant case did not belong within any of the exceptions. Voehl was not immediately adjacent to his employer's premises, but several miles distant therefrom. The vehicle was not furnished by or under the control of the employer, but was Voehl's own automobile and exclusively under his control. While, as service manager, Voehl was subject to call to go on special errands to take care of customers' refrigerators, he "was not engaged in that sort of service when the accident occurred" (R. 72).

The court then summarized its conclusion, which was fully supported by the evidence, as follows:

> "The evidence clearly established, we think, that the purpose of the trip on the Sunday morning of the accident was to procure a load of ashes for Voehl's personal use, and that if in fact he intended to remove some trash, this was merely incidental to the general purpose for which the trip was made. *Voehl at the time and place of the injury was not performing any duty in the course of his employment.*" (Italics supplied.)

The sentence last quoted and italicized, whether it be defined as a *jurisdictional fact* or a *conclusion of law,* was a matter for the court to decide. The rulings

of a deputy commissioner upon internal administrative matters, such as questions relating to the nature and extent of the injuries, which plainly come *within* the purview of the Compensation Act, are final, but, when he attempts to decide the question of employment or non-employment, upon which his jurisdiction depends, his action may be reviewed by the court specifically designated by Section 21*b* of the Compensation Act, which prescribes the procedure by which the enforcement of an award in such a case may be enjoined, when the award is "not in accordance with law."

CONCLUSION.

Under the decision in *Crowell* v. *Benson,* 285 U. S. 22, the Court of Appeals had full power and authority to consider the evidence set forth in the exhibit forming part of the bill of complaint and was right in holding that "Voehl at the time and place of the injury was not performing any duty in the course of his employment" (R. 72) and that the "cause of the accident was too remote to bring the case within the provisions of the Compensation Act" (R. 73). This conclusion agrees with the conclusion first reached by the Deputy Commissioner (R. 8).

If petitioner's contention should be sustained, then every employee, stenographer, clerk, and laborer, who goes to the office, warehouse or store of his employer on a Sunday, outside of his regular hours of work on week days, would be covered by compensation insurance from the moment he leaves his home, whether he travels on foot, in his own automobile or in a public

vehicle, and, if that is so, the coverage might as well extend to the hazard of descending the stairs from the second to the first floor of his home, and then extend back to the perils of his bathroom, while dressing in the morning. Certainly, the legislative authority, in enacting the Compensation Law, intended no such absurd result.

The line of coverage must be drawn somewhere, according to common sense and reason. The line of coverage has been drawn, in many cases above cited, including a recent decision of this Court, at a point on the employer's premises, or "those of another in such *proximity* and relation as to be in practical effect a part of the employer's premises."

Bountiful Brick Co. v. *Giles,* 276 U. S. 154, 158.

While Voehl was driving his own automobile from his home to his employer's warehouse, he was within the general rule that employees are not covered by compensation insurance while going to and from their place of work, and, as shown above, none of the exceptions to the rule are applicable to the situation here involved.

It is confidently asserted that counsel for petitioner will be unable to cite a *single case* that goes to the extent of awarding compensation to an employee who was injured, several miles from his destination, while using his own automobile on his way from his home to a fixed place of employment.

It is, therefore, respectfully submitted that the decree of the Supreme Court of the District of Columbia

dismissing respondent's bill of complaint to enjoin enforcement of the Deputy Commissioner's award should be reversed, and the judgment of the Court of Appeals so ordering, should be affirmed.

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(2785)

SUPREME COURT OF THE UNITED STATES.

No. 315.—October Term, 1932.

Karl F. Voehl, Petitioner,
vs.
Indemnity Insurance Company of North America.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[February 6, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

By the Act of Congress of May 17, 1928 (45 Stat. 600, D. C. Code, Tit. 19, secs. 11, 12), the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., secs. 901-950) are made applicable to employees, as stated, in the District of Columbia. Petitioner, Karl F. Voehl, an employee of the National Electrical Supply Company, which was engaged in business in the District, filed a claim for compensation for an injury sustained through an automobile accident while he was on his way to his employer's place of business on Sunday, April 6, 1930, for the purpose, according to his contention, of performing the duties assigned to him. The employer was notified and hearing was had before the deputy commissioner. Respondent, the insurance carrier of the employer, contested the claim. Admitting that the relationship of employer and employee existed on the date of the injury and that the employer was subject to the Compensation Act, respondent defended upon the ground that the injury did not arise out of and in the course of the employment. The deputy commissioner received the evidence offered, which included the testimony of the employer's manager with respect to the petitioner's duties, and made a compensation order setting forth detailed findings of fact supporting the claim and awarding compensation.

Respondent then filed a bill of complaint in the Supreme Court of the District to obtain an injunction restraining the enforcement of the compensation order and annexed to the bill, as a part thereof, the full record of the proceedings and evidence before

the deputy commissioner. Respondent charged that the compensation order, findings and award, were not in accordance with law and were not supported by the evidence. Petitioner was permitted to intervene. Motion by the deputy commissioner to dismiss the bill of complaint was granted and decree was entered accordingly. On appeal, the Court of Appeals of the District, taking a different view of the evidence, reversed the decree (58 F. (2d) 1074) and the case comes here on certiorari. 287 U. S. —.

The relation of master and servant admittedly existed. The business of the employer, carried on within the District, and the nature of the petitioner's employment, were such that both were subject to the Compensation Act. D. C. Code, Tit. 19, secs. 11, 12. By the express provisions of the Act, the deputy commissioner was authorized to entertain the claim of the employee and "to hear and determine all questions in respect of such claim". 33 U. S. C., sec. 919 (a). The proceedings of the deputy commissioner conformed to the statute. The precise issue, whether the injury arose out of and in the course of the employment, turned on the general nature and scope of the employee's duties, the particular instructions he had received and the practice which obtained as to work in extra hours or on Sundays, and the purpose of the journey in which he was injured. We think that there can be no doubt of the power of the Congress to invest the deputy commissioner, as it has invested him, with authority to determine these questions after proper hearing and upon sufficient evidence. And when the deputy commissioner, following the course prescribed by the statute, makes such a determination, his findings of fact supported by evidence must be deemed to be conclusive. *Crowell* v. *Benson*, 285 U. S. 22, 46, 47; *L'Hote* v. *Crowell*, 286 U. S. 528.

The deputy commissioner found that petitioner was injured while on his way to the employer's warehouse for the purpose of clearing it of debris in accordance with his duties, and that when so engaged on Sunday the terms of his employment covered the period of service from the time he left his home until his return, his compensation for this service being at an agreed rate per hour for the entire time with an allowance for his transportation. We think that these findings were supported by the proof. From the testimony of the employer's manager who had supervision of petitioner's work, it appeared that petitioner, being employed in the

'refrigeration division' of the Supply Company, had charge of the maintenance and operation of the company's warehouse and of the maintenance of service on refrigerators in customers' homes. He was the "head of the products division". With other matters, it was his duty to see that the buildings and stock were kept in proper order and that there was compliance with the fire rules. He had strict instructions with respect to the disposition of debris and their prompt removal. Voehl was a trusted employee who had been with the company for sixteen years and the company relied upon him to attend to whatever was necessary in the line of his work without specific or detailed instructions. His regular hours at the company's building were from 7:30 A. M. to 5:30 P. M. The manager testified that, in addition to these hours, Voehl was "on duty all of the time, on our call. That is to say, he was a very willing employee and we kept him purposely for taking care of emergencies and seeing that all details were cleaned up properly". By reason of the 24-hour service which the company maintained, Voehl was always subject to the calls of customers, responding either personally or through one of the service men under his direction. He had access to the warehouse at all times. Voehl used his own automobile, and when he was at work for the company outside of "office hours" and on Sundays he was paid a mileage rate of five cents a mile for the use of his car and at the rate of 75 cents per hour from the time he left his home until his return. As the one in charge of the warehouse and service, Voehl submitted weekly a memorandum of the overtime of the employees under him and his own. The company had found him to be honest in his statements and his overtime account was never questioned.

Respondent's contention was that Voehl was going to the warehouse for a purpose of his own,—to obtain ashes to place in front of his house, being accompanied by his brother-in-law to assist him in their removal. The evidence showed that the company did not object to the employees taking ashes but their removal was not part of Voehl's work. Voehl's statement was that the purpose of his Sunday trip was to remove an unusual accumulation of trash, which it was his duty to remove, and that under his orders it was necessary for him to do this on Sunday in order that the building might be in proper condition on the following morning. He said that he often had "to come down on Sundays to finish cleaning

up", that the manager inspected the warehouse "every Monday morning to see that it was free of all trash" and that he (Voehl) did his utmost "to have the building clean for inspection". While his brother-in-law testified as to the intention to take the ashes, he also said that Voehl "went there specifically to straighten up the warehouse and bring the ashes back home when he came back". Voehl's statement as to the necessity of his trip on the particular Sunday, in the course of his duties, finds corroboration in the testimony of the manager. The latter said that Voehl had authority to go to the plant on the Sunday in question and that he could have made a charge for his service on that day and for his mileage. While the manager did not himself know the condition of the plant on the day of the accident, or the day before, he did know that there had been an unusual amount of unpacking of refrigerators during the three days before the accident and that such work was "always attended by a large accumulation of trash and litter which must be cleared up". He said that "two or three days prior to the accident" he had called Voehl's attention "to the necessity of keeping it better cleared up"; he knew that the warehouse at that time "was in a badly littered condition". The manager also had information as to Voehl's work on previous Sundays and, on respondent's request, furnished a statement of what the manager described as an "exactly parallel instance" for which Voehl had been paid, and he believed that if the records of the busy season from April to August were available, they would show other similar instances.

Upon this evidence and the findings of the deputy commissioner, the compensation order did not violate any principle of law. The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment.[1] Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment. "No exact formula can be laid down which will automatically solve every case". *Cudahy Company* v. *Parra-*

[1]Podgorski *v.* Kerwin, 144 Minn. 313; Nesbitt *v.* Twin City Co., 145 Minn. 286; De Voe *v.* New York State Railways, 218 N. Y. 318; Grathwohl *v.* Nassau Point Club Properties, 216 App. Div. (N. Y.) 107, 243 N. Y. 567; Gilmour *v.* Dorman, 105 L. T. (N. S.) 54;

more, 263 U. S. 418, 424. See, also, *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act.[2]

The decree of the Court of Appeals is reversed and that of the Supreme Court of the District is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2]Jett *v.* Turner, 215 Ala. 352; State Compensation Insurance Fund *v.* Industrial Accident Commission, 89 Cal. App. 197; Swanson *v.* Latham, 92 Conn. 87; Ohmen *v.* Adams Brothers, 109 Conn. 378; Littlefield's Case, 126 Me. 159; Vogel's Case, 257 Mass. 3; State ex rel. McCarthy Bros. Co. *v.* District Court, 141 Minn. 61; Martin *v.* Card & Co., 193 App. Div. (N. Y.) 6; Gibbs *v.* R. H. Macy & Co., 214 App. Div. (N. Y.) 335, 242 N. Y. 551; McClelland *v.* Dodge Brothers, 233 App. Div. (N. Y.) 504; Messer *v.* Mfrs. Light & Heat Co., 263 Pa. 5; Cymbor *v.* Binder Coal Co., 285 Pa. 440; Rock County *v.* Industrial Commission, 185 Wis. 134; Consolidated Underwriters *v.* Breedlove, 114 Tex. 172. See, also, McNicol's Case, 215 Mass. 497; Marks *v.* Gray, 251 N. Y. 90.